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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5671

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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STATE OF OREGON, Acting by and through the State Land Board,

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CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

The petitioner State of Oregon, acting by and through its State Land Board, prays that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of Oregon entered in this proceeding on June 12, 1975.

OPINIONS BELOW

The trial court's memorandum opinion is reprinted in Appendix G.

The opinion of the Court of Appeals of the State of Oregon affirming in part and reversing in part the judg-

ment of the trial court is reported at 99 Adv Sh 1532, 18 Or App 524, 526 P2d 469 (1974) and reprinted as Appendix F hereto.

The opinion of the Supreme Court of the State of Oregon affirming the judgment of the Court of Appeals as modified is reported at 75 Adv Sh 2068, — Or ——, 536 P2d 517 (1975) and reprinted as Appendix A hereto.

A second opinion of the Oregon Supreme Court is reported at 75 Adv Sh 2562, —Or ——, 538 P2d 70 (1975) and reprinted as Appendix B hereto.

JURISDICTION

On June 12, 1975, the Supreme Court of Oregon entered its judgment affirming the judgment of the Court of Appeals as modified.

On July 17, 1975, the Supreme Court of Oregon in a clarifying opinion denied timely petitions for rehearing filed by both parties.

On August 6, 1975, in response to a timely motion of the defendant, the Supreme Court of Oregon "denied respondent's [defendant's] motion to withdraw, or suspend clarification of opinion with regard to the above entitled case." (Appendix C). This petition for a writ of certiorari was filed within 90 days of that date pursuant to rule 22(3) and the provisions of 28 USC § 1257(3) under which the jurisdiction of this Court is invoked.

QUESTION PRESENTED

In a typical situation of a navigable river flowing through two channels, where the smaller of the two channels after 20 years of erosive flooding "suddenly" becomes the main channel, and the other channel eventually becomes unusable, does federal law deprive the public of title to the beds of both channels?

STATUTE INVOLVED

11 Stat 383 provides that:

"That Oregon be, and she is hereby, received into the Union on an Equal footing with the other States in all respects whatever, with the following boundaries: . . ."

STATEMENT OF THE CASE

A. General Background

The Willamette River is a navigable river within the state of Oregon. In 1859, Oregon was admitted into the Union "on an [e]qual footing with the other states in all respects whatever". 11 Stat 383. Under the equal footing doctrine title to lands beneath navigable waters passed from the Federal Government to the new states upon their admission to the Union. *Bonelli Cattle Co. v. Arizona,* 414 US 313, 318 (1973). Oregon thus acquired at statehood title to the beds of all rivers then navigable within its boundaries. *United States v. Oregon,* 295 US 1, 14 (1935); *State v. McVey,* 168 Or 337, 345, 121 P2d 461 (1942).

This case arises because the state brought ejectment to recover possession from defendant of various parcels comprising the present riverbed including parcels comprising "Fischer Cut" to which the state claimed ownership by virtue of its sovereignty. Fischer Cut is now the main channel of the river but prior to 1910 was a subsidiary channel across the neck of Fischer Island. *See* figure 1 at 18.

With exceptions not here material, the trial court ruled in favor of the state on all the parcels claimed except for parcels 2A, 2B and 2C and a portion of parcel 3 which the trial court held were part of Fischer Cut and avulsive and, therefore, belonged to the defendant (Appendix G).

Both parties appealed. The Oregon Court of Appeals affirmed. On review, the Oregon Supreme Court affirmed the Court of Appeals on the issue of avulsion but modified that court's holding as to the length of the avulsion and as to damages (Appendix A).

B. Facts Material to the Question Presented.

1. Characteristics of the River.

The Willamette River is a typical navigable river subject to numerous changes in course (Tr 1044-1045). Contributing to its instability were banks of a "loose sandy soil or gravel" which were "constantly caving and precipitating trees into the river" (Ex 112-A at 5) with

the result that natural wingdams formed, new islands and channels were constantly being created and "channel changes occurred at some locations year to year" (Ex 94-A at 3-5, Ex 114 at 907, Ex 115 at 655; Tr 521-522). Frequent changes of course also occurred in the Corvallis area which was a typical reach of the river (Ex 94-A at 3-5; Tr 779). A factor in this process was recurrent winter flooding (Ex 114-C at 2848) with extraordinary floods occurring in 1861, 1890, 1893, 1894, 1901, 1903, 1907 and 1909 (Ex 71 at 8-9, 162, 174, 202, 203; Ex 94-A at 7, 9; Tr 434). In the Corvallis area banks under 20 feet were covered by high water whereas during extreme high water the whole valley was overflowed (Ex 94-A at 2, Ex 112-A at 5; Ex 114-C at 2848; Tr 394, 396, 1032-1035).

2. Formation of Fischer Cut.

In 1853 and thereafter, the Willamette River at Corvallis coursed around a peninsula-like formation, or oxbow, which later became Fischer Island (Ex 59, Hyde Survey of 1853). *See* figure 2 at 19. Exhibit 59 itself shows evidence of minor erosive channels or gullies near the neck of the oxbow.

By 1890 an overflow channel about 3200 feet in length had formed at the neck of the peninsula (Ex 62). *See* figure 1 at 18. Water commenced to run in this channel at the five-foot stage (Ex 114-C at 2849; Tr 225). It was

noted in an early official report in 1890 that if the overflow channel "were cleaned of the driftwood and willow growth, so as to give *the high water a free channel, I think that the water would enlarge it very much and probably change the course of the river of its own accord as it is a direct chute and the material of a sandy nature.*" (Ex 98-A at 2) (emphasis supplied).

This report was followed by another in 1892 which noted that at Corvallis the valley bottom consisted of three channels for low water discharge and also "sloughs, high water channels and old riverbeds, that serve as outlets for the water at medium and ordinary high water stages." (Ex 114-C at 2848; Tr 299-300). The report noted the sandy nature of the chute, its natural enlargeability by the river if it were cleared of debris and that "in time the low water flow of the river may take this course." (Ex 114-C at 2849; Tr 304).

The effect of the floods of 1893, 1894, 1901 and 1903 and normal winter flooding was to deepen and enlarge the overflow channel so that by 1906 an estimated one-fourth of the river was flowing through this channel at only the four-foot stage (Ex 110-A, Appendix J; Tr 225). Also, the banks of the overflow channel were "caving" eastward (to the right) toward Fischer Island away from the firm left bank, the "Seavy" side. (Ex 110-A at 2; Appendix J; Tr 387, 390, 404, 514, 702-703).

Fischer Island and Fischer Cut were owned by the Fischer family (Tr 398, 399). Fred Fischer, their son, testified no one cleared the overflow channel of the trees and debris—natural winter flooding did this (Tr 404). Fischer testified:

"Q. I see. *Did this gully enlarge during the years?*

"A. *O, yes, it kept going in all the time now.*

"Q. When you say kept going in—

"A. Going, going east.

"Q. *You mean moving toward Fischer Island?*

"A. *Yes, taking soil away from us.*

"Q. I see.

"A. Probably as much as, oh, that area, *I should judge we lost through that Fischer Cut probably 60 acres.*

"Q. You mean the water eroded this away?

"A. *Yeah, in time, oh a period of five years anyway.*

"Q. I see.

"A. *Before it broke through* and it kept gradually—gradually—and finally the steam boat used to go around here." Tr 394-395 (Appendix K at 107, *see also* Tr 403 (Appendix K at 113-114) (emphasis supplied)[1]

Following the major floods of February 1907 and

[1] The Oregon Supreme Court interpreted Fischer's testimony (Appendix K) as failing "to explain whether the erosion he referred to occurred before or after the 1909 flood" 536 P2d at 519. The testimony and exhibits referred to above render this interpretation incorrect, particularly because the major erosive floods occurred prior to 1910 without another major flood until 1923. *See* US Army Corps of Engineers, Flood Plain Information, Corvallis and Philomath, Oregon at 2 (March 1971). *See* Tr 434, 1033-1035. Also, the banks of the cut were "caving" in January of 1906, almost four years before the final change (Ex 110-A at 2, Appendix J).

November 1909 (Ex 71 at 162, 174; Tr 1032-1033, 1034, 1035), witnesses viewing the area in 1910 or 1911 observed the "main body of the river" flowing in the Fischer Cut area (Tr 879-881, 939-940) while the river still ran "quite a lot" around the old channel (Tr 880, 939-940), which eventually dried up (*Compare* Ex 2, 1971 aerial photograph with Ex 15, 1936 aerial photograph). A United States Geological Survey Map of 1911-1913 shows the new configuration of the river after the change (Ex 54, 257). *See* figure 3 at 20.

C. Manner in Which the Federal Question was Raised

In its ejectment complaint the state alleged the parcels comprising Fischer Cut were part of the riverbed and owned by it by virtue of its sovereignty. In its testimony the state asserted that Fischer Cut was formed by erosion and was not avulsive (Tr 296, 514-515). In its briefs in the trial court the state asserted that what occurred at Fischer Cut was a process of erosion and submergence, not avulsion and that an avulsion did not arise where there were existing channels.

The trial court, however, while finding that Fischer Cut had existed as early as 1890, and that it carried one-fourth of the river's volume in January of 1906 (Appendix H at 85), nevertheless found that

> "6. As the result of a flood of November 25, 1909, the river suddenly and with great force and violence *converted Fischer Cut into the main channel of the river.*
>
> "7. The change was not gradual and perceptive *but was a rapid and violent change of course, avulsive in character* and constituted an avulsion" Appendix H at 85 (emphasis supplied)

The state in its opening appeal brief in the Oregon Court of Appeals stated the issues to be:

> "1. Where the smaller of two channels of a navigable river carries one-fourth of the river's flow, does the river's sudden enlargement and conversion of the smaller channel, so that it becomes the channel carrying the larger volume constitute an avulsion?"
>
> "2. Was there any evidence before the trial court from which the trial court could have concluded that the enlargement 'Fischer Cut' into the river's main channel was sudden and avulsive?"

The state then assigned as error the trial court's award of title to the disputed area to defendant (Ap Br 2, 3, 26, 34).

REASONS FOR GRANTING THE WRIT

I. Conflict of State decision with Bonelli Cattle Co. v. Arizona, 414 US 313 (1973)

The facts set out in our statement are for the most part contained in uncontradicted official Corps of Engineers' reports. The cited testimony of the witnesses (most of the references are to defendant's witnesses) is also uncontradicted and in harmony with the documentary evidence. The trial court's findings are also in

harmony with the uncontradicted facts set out herein except that the trial court's finding, inference or conclusion of an avulsion which it drew from those facts is manifestly incorrect as a matter of law for two reasons.

First, where a river flows through two existing channels and suddenly converts the secondary channel to the main channel there cannot be an avulsion because there is no sudden abandonment of an existing channel for a wholly new channel (an avulsion), only enlargement of the existing, secondary channel.

Second, what really happened in Fischer Cut, as the uncontradicted recited facts make clear, was the result of a 20-year process of erosion and submergence, the last event of which was the final enlargement of Fischer Cut resulting in the river "suddenly" converting Fischer Cut into the main channel.

The trial court held this change to be avulsive and the Court of Appeals found "evidence in the record to support this conclusion." 526 P2d at 476. The Supreme Court agreed. 536 P2d at 518.

If this application of the doctrine of avulsion is allowed to stand, however, then the principle of public ownership of navigable riverbeds enunciated by *Bonelli* has been effectively nullified. *Bonelli* declared that "in order for the States to guarantee full public enjoyment of their navigable watercourses, it has been held that

their title to the bed of a navigable river mechanically follows the river's gradual changes in course." *Bonelli* 414 US at 318. The exception to this rule arises only where ". . . 'a stream suddenly and perceptibly abandons its old channel' . . . 414 US at 327. This exception however does not include enlargement of an existing secondary channel over a 20-year period marked by erosive floods which at the end of the period is "suddenly" converted into the main channel, the former channel continuing to flow for a time (Tr 880, 939-940).

To conclude that this typical series of events constitutes an avulsion is for all practical purposes to nullify the rule of public title to navigable riverbeds.

The Court of Appeals itself, however, realized that the facts did not fit the principle of avulsion. It said, citing *Commissioners v. United States*, 270 F 110 (8th Cir 1920):

> "*But even if the doctrine of avulsion does not adequately fit the facts in the case at bar*, there is a middle course between the avulsion and accretion doctrines which perhaps more accurately reflects the facts presented. This is the so-called exception to the accretion rule announced in *Commissioners v. United States*, 270 F 110, 113-114 (8th Cir 1920) . . ." 526 P2d at 476-477 (emphasis supplied)

In *Commissioners*, the Arkansas River, a non-navigable river (270 F at 111), flowed in 1883 in two channels around an island. The island was within the south and main channel of the Arkansas River. In 1883 the United

States conveyed certain lands to the Indians bounded on the south and west by the main channel of the Arkansas River. By 1920, the main channel had shifted to the north channel, the south channel had dried up and the island and the south channel were one solid mass of land. The riparian owners on the bank of the old south channel claimed in opposition to the Indians that the island was theirs under the doctrine of accretion. The court disagreed, enunciating the exception to the accretion rule:

> ". . . To this rule, however, *there is a well-established and rational exception.* It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, *but by flowing around this intervening land,* which [the intervening land] never becomes in the meantime its main channel, *and the change from the old to the new main channel is wrought during many years* by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, *the boundary line between the estates remains in the old channel* subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream [citations omitted]." 270 F at 113-114 (emphasis supplied)

Thus *Commissioners* involved a boundary dispute between riparian owners on a non-navigable river. The

case held that the boundary remained in the centerline of the old, but still visible, channel. The holding, while correct, did not deal with the *Bonelli* rule of movement of the public's title to the bed of a navigable river as the river changes course. If the Arkansas River had been navigable and the issue of bed ownership by the public had also been before the court, *Commissioners* could still have ruled that the public had title to the new main channel's bed even though for boundary purposes the former main channel still served as the boundary between the two riparian owners. In other words, the exception to the accretion doctrine is applicable only to a boundary issue between two riparian owners. It does not prevent the public's title to the riverbed from following the river as it enlarges a secondary channel into the main channel.

Nevertheless the Oregon Court of Appeals relied on this case saying:

> "While the court treated this as a form of accretion, the result is the same as avulsion in that the boundary line was found not moved to the new channel but rather remained in the old main channel . . .
>
> "*Since the rule of Commissioners yields the same outcome as the avulsive theory, the same result would apply as to the title of newly submerged lands, namely, that it remains in the former owner and does not pass to the state. . . .*" 256 P2d at 477 (emphasis supplied)

The Supreme Court of Oregon agreed. 536 P2d at 518.

Both courts confused the issue of locating the boundary between two riparian owners in a two-channel situation with the issue of whether the public's title to the riverbed in that situation should follow the river as it flows through the secondary channel, which, after a period of time is "suddenly" converted into the main channel.

II. Importance of this issue.

The real issue here is whether the public has title to the beds of navigable rivers. All navigable rivers are meandering (Tr 757, 1044-1045). In the 120 years since Oregon's statehood, the Willamette River has undergone so many changes of course throughout its 200-mile length that to say this typical change was avulsive is to say in effect that the bed of the river as it presently flows, or major portions of such bed, do not belong to the state. Thus the decision means uncertainty as to title, a checkerboard of public and private ownerships in the existing riverbeds, uncertainty as to the extent[2] of those ownerships and massive, expensive and complicated litigation to establish title. Moreover, because of the *Bonelli* doctrine that the State's title is to the "[r]iverbed as a bed" it would seem that the state no longer has title to formerly submerged and submersible lands which the

[2] See the Oregon Supreme Court opinions in this case at 536 P2d 517 and 538 P2d 70 (Appendices A and B).

river has abandoned because of such "avulsive" changes. *Bonelli*, 414 US at 322, 328. Thus the state would own neither the old or the new bed if *Bonelli* means what it seems to say and the Oregon court's misapplication of *Bonelli* is allowed to stand.

CONCLUSION

Unless this court takes jurisdiction of this controversy, the ownership of navigable riverbeds in this and other states will be under a cloud because this court's definition of avulsion, namely, ". . . where 'a stream suddenly and perceptibly abandons its old channel' " *Bonelli, supra* 414 US at 427, is so cryptic as to lead to the kind of misapplication of the principle of avulsion as in the present case.

A simple solution is available, however:

(1) By definition, an avulsion should be defined so as to exclude the two-channel situation where what was once an existing secondary channel becomes the main channel over a period of time, even though the final event completing the process is sudden. The reasons: there is no change of channel only enlargement of an existing one. Moreover, the facts of nature inevitably make this truly a long-term process rather than a sudden event. *Commissioners v. United States, supra.*

(2) The rule defining avulsion should also clearly distinguish between what constitutes erosion and what

constitutes avulsion. In making the distinction the court must look to the characteristics of the river in question and determine whether the change was characteristic of the river, relatively common and therefore foreseeable (erosive) or whether the change was uncharacteristic, unusual and therefore unforeseeable (avulsive). *See, Philadelphia Co. v. Stimson,* 223 US 605, 624 (1912); *Arkansas v. Tennessee,* 246 US 158, 173 (1918); *Jefferis v. East Omaha Land Co.,* 134 US 178, 190 (1890); *State ex rel v. Warden,* 200 Okla 613, 198 P2d 402, 406-407 (1948); *Hancock v. Moore,* 135 Tex 619, 146 SW 2d 369, 370-371 (1941); *Wood v. McAlpine,* 85 Kan 657, 118 P 1060, 1065 (1911); *Nebraska v. Iowa,* 143 US 359, 368-370 (1892). In *Wood v. McAlpine, supra,* the court said:

> ". . . In view of the conditions shown however, the jury should have been given to understand that, *considering the character of the bank, and the characteristics of the stream,* including the testimony as to its habit of 'eating under,' and its effect, they must, to find avulsion determine from all the evidence that the destruction was sudden, rapid, visible, violent, of substantial amount, *and in a manner unusual along the Missouri river,* . . . 118 P at 1065 (emphasis supplied)

In accordance with this approach, violent and rapid changes in the Missouri, Mississippi, Rio Grande and Red Rivers have been treated as accretive and erosive rather than avulsive. This is because such changes are typical rather than unusual. *Wood v. McAlpine, supra*

118 P at 1064, 1065; *Oklahoma v. Texas,* 260 US 606, 636-638 (1923); *Nebraska v. Iowa, supra* 143 US at 369-370; *Jefferis v. East Omaha Land Co., supra* 134 US at 190; *Denny v. Cotton,* 3 Tex Civ App 634, 22 SW 122 (1893). This element of the definition in effect provides the policy basis for determining when riparian owners should bear the loss of a change in the river because usual and foreseeable, or the public should bear the loss of the change because the change was unusual and unforeseeable.

As formulated, the proposed definition is not only consistent with the federal cases, but it provides a basis for certainty in the law without the necessity of complicated litigation. Avulsions will be limited to the rare and catalysmic events that they are supposed to be. *See Pannell v. Earls,* 252 Ark 385, 483 SW 2d 440, 442 (1972).

Accordingly, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Oregon herein.

Respectfully submitted,
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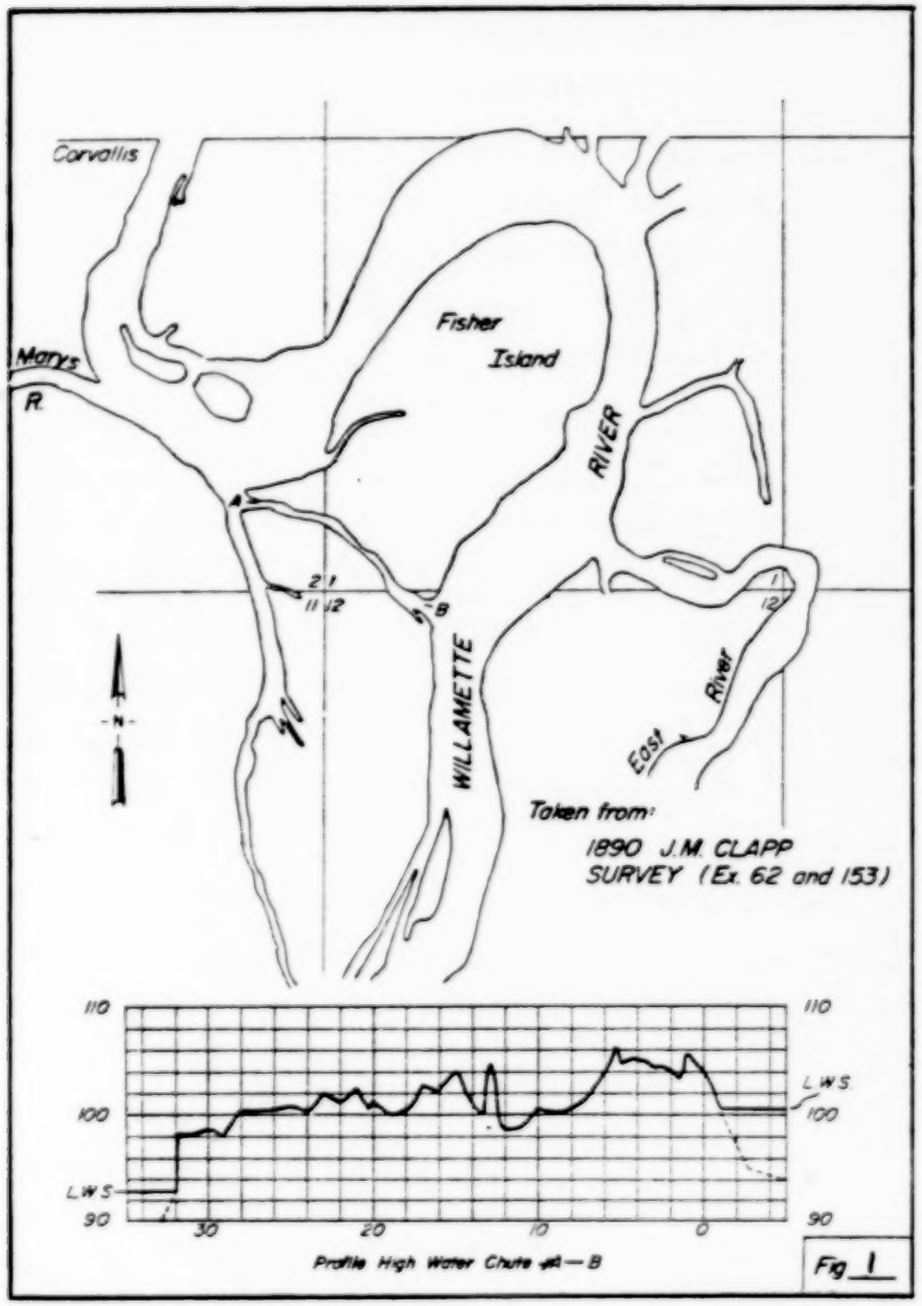
October, 1975


Corvallis
Marys R.
Fisher Island
RIVER
WILLAMETTE
East River
Taken from:
1890 J.M. CLAPP SURVEY (Ex. 62 and 153)
110
100
90
LWS
30
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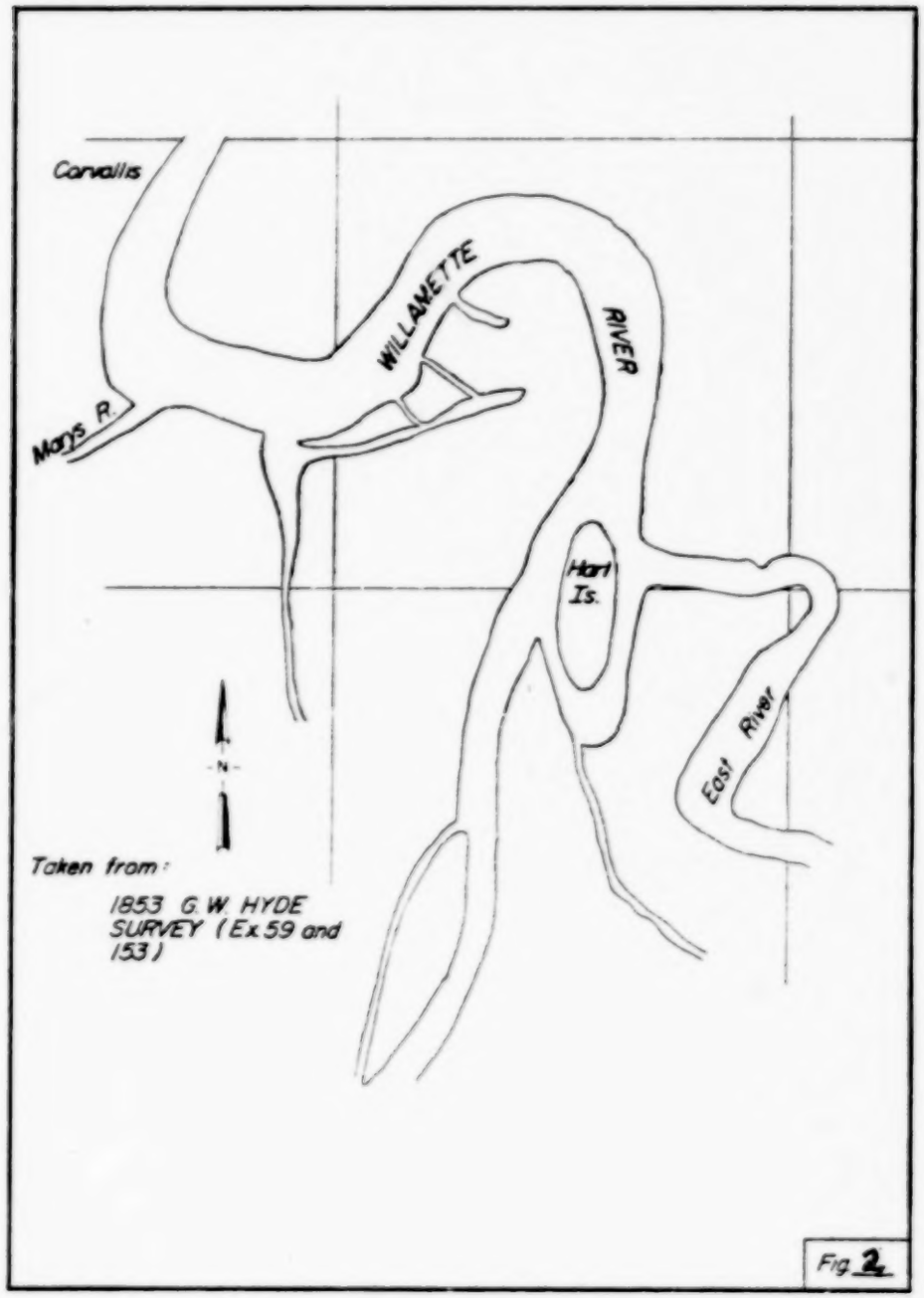
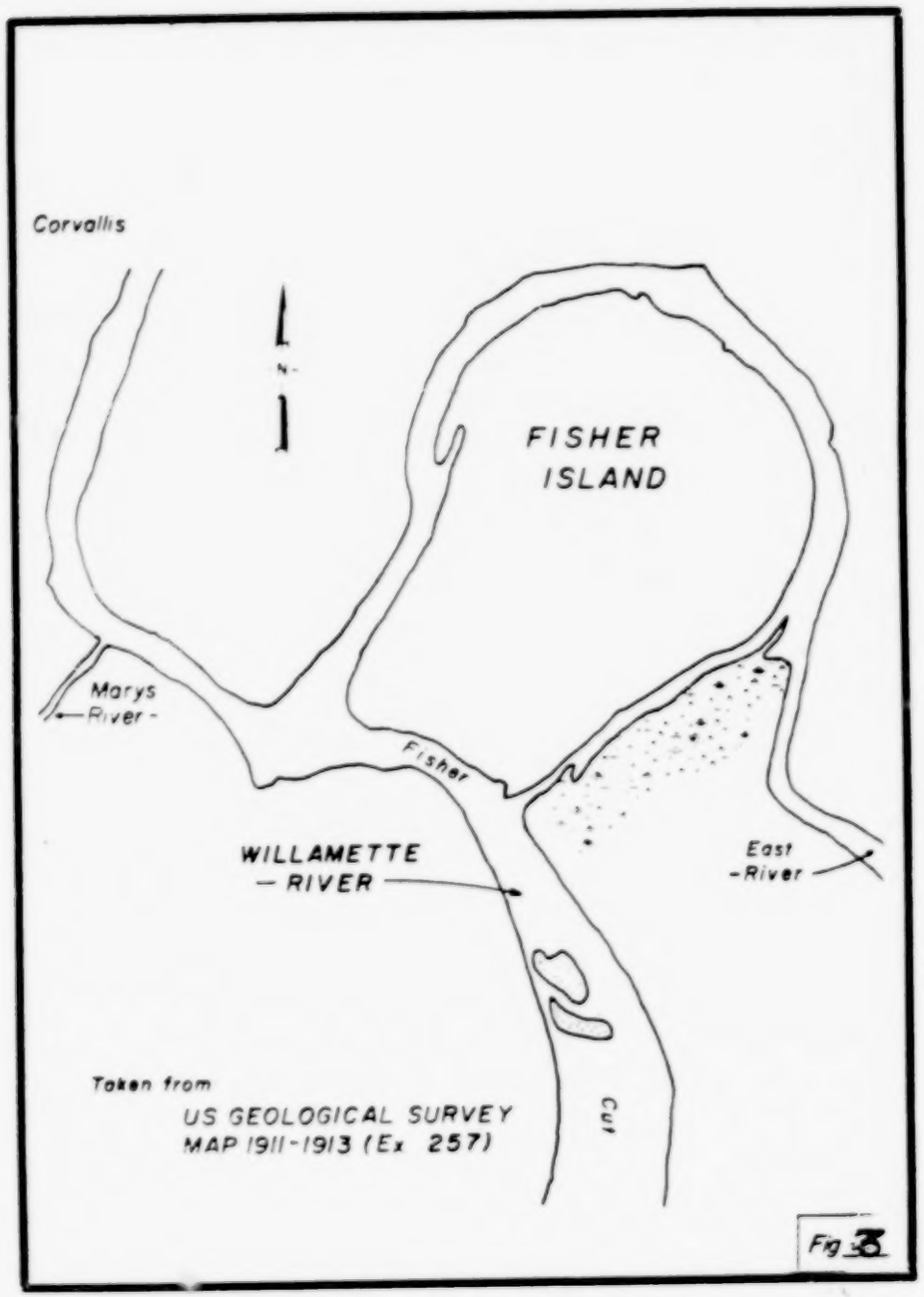
Profile High Water Chute #1 — B
Fig 1


Corvallis
Marys R.
WILLAMETTE
RIVER
Hart Is.
East River
Taken from:
1853 G.W. HYDE SURVEY (Ex. 59 and 153)
Fig 2


Corvallis
N
FISHER
ISLAND
Marys
River
Fisher
WILLAMETTE
RIVER
East
River
Taken from
US GEOLOGICAL SURVEY
MAP 1911-1913 (Ex 257)
Fig 3

APPENDICES

APPENDIX A

OPINION OF OREGON SUPREME COURT
No. 1940—June 12, 1975

STATE EX REL STATE LAND BOARD, *Respondent—Cross-Petitioner, v.* CORVALLIS SAND AND GRAVEL COMPANY, *Petitioner.*

On Review from the Court of Appeals.

Argued and submitted April 3, 1975.

Robert Mix, Corvallis, argued the cause and filed the briefs for petitioner.

Peter S. Herman, Senior Counsel, Salem, argued the cause for respondent and cross-petitioner. With him on the briefs were Lee Johnson, Attorney General, and W. Michael Gillette, Solicitor General, Salem.

Before O'CONNELL, Chief Justice, and MCALLISTER, DENECKE, HOLMAN, HOWELL and BRYSON, Justices.

AFFIRMED AS MODIFIED.

HOWELL, J.

This is an action in ejectment brought by the state pursuant to ORS 105.005 et seq. The state sought to obtain possession of the Willamette riverbed in the Corvallis area and damages for the reasonable value of the defendant's use of portions of that riverbed. The trial court awarded to the defendant certain portions of the riverbed within an area known as Fischer Cut and awarded other disputed portions to the state. Both parties appealed the judgment of the trial court to the Court of Appeals. The Court of Appeals affirmed the trial court's division of the parcels of land involved but reversed the trial court's award of damages for defendant's use of an area known as Parcel 3.

The history of this litigation and the numerous legal and factual issues are set forth in the opinion of the Court of Appeals, *Land Bd. v. Corvallis Sand &*

Gravel, 99 Adv Sh 1532, 18 Or App 524, 526 P2d 469 (1974). We agree with the Court of Appeals that there was substantial evidence in the record to support either the theory that Fischer Cut of the Willamette was formed by an "avulsive" process or by the "exception to the accretion rule" process as described by the federal court in *Commissioners v. United States*, 270 F 110, 113-14 (8th Cir 1920). We accepted defendant's petition for review solely on the question concerning the length of the Fischer Cut area through which the Willamette River has coursed since a major flood in 1909.

The trial court made the following findings regarding Fischer Cut:

> "1. Fischer Island from 1853 to 1909 was a peninsula-like formation around which the Willamette River coursed.
>
> "2. By 1890 a clearly discernible overflow channel over the neck of the peninsula had developed known as Fischer Cut.
>
> "• • • • •.
>
> "4. In January of 1906 the Fischer Cut Channel was in practically the same location as it was in 1890. It was estimated then that roughly one-quarter of the flow of the river was carried through Fischer Cut.
>
> "• • • • •.
>
> "6. As a result of a flood of November 25, 1909, the river suddenly and with great force and violence converted Fischer Cut into the main channel of the river.
>
> "7. The change was not gradual and imperceptible, but was a rapid and violent change of course, avulsive in character and constituted an avulsion.
>
> "• • • • •."

The trial court awarded Parcels 2A, 2B and 2C to the defendant. Those parcels lie between the lines of ordinary high water and encompass a riverbed distance of 1250 feet. In addition to this award, the trial court added to the length of riverbed awarded to the defendant the area downstream from the end of Parcels 2A, 2B and 2C to the confluence of the East River Channel and the Willamette River. This area come from part of Parcel 3 and was made, as the state conceded at oral argument, on the basis of the statutory grants available to riparian owners between 1874 and 1878.

On appeal to this court, the state maintains that the trial court's findings regarding the length of Fischer Cut are correct. However, Corvallis Sand & Gravel contends that Fischer Cut is 3200 feet in length and that the trial court's finding of the length of the Cut is not supported by the evidence.

The evidence concerning the length of Fischer Cut consists of various documents and testimony. The asserted 1250-foot length of Fischer Cut coincides with the linear riverbed distance of Parcels 2A, 2B and 2C which the state first claimed in its 1969 complaint. The state argues that portions of the Fischer Cut area eroded away between 1890 and the 1909 flood. At trial, the state's expert witness, Ronald McReary, utilized a 1936 aerial photograph to point out an alleged cut-bank on the upstream side of Parcels 2A and 2B, thus suggesting that the Cut was only 1250 feet long. The state also relied upon the testimony of one of its witnesses, Fred Fischer, who, as a boy, roamed through the area of Fischer Cut and who testified that the Willamette River moved east and took several acres of land with it. However, the state, in attempting to prove its erosion theory and the 1250-foot figure, relies on documentary evidence showing the area *after* the 1909 flood. Further, Mr. Fischer's testimony, taken as a whole, fails to explain whether the erosion he referred to occurred before or after 1909.

The evidence that Fischer Cut at the time of the 1909 flood was 3200 feet in length is substantial and highly persuasive. The trial court found that in 1906 the Fischer Cut was in practically the same location as it was in 1890 and that until 1909 the Willamette River continued to flow around Fischer Island. In 1890 the U.S. Army Corps of Engineers carefully mapped this stretch of the Willamette River, including the area of Fischer Cut. The 1890 Clapp map shows the existence of an overflow channel in the Fischer Island area. Both parties stated that this map was carefully drawn and prepared. The scale shows that the overflow channel from "upstream" to "downstream" points is approximately 3200 feet in length.

Later, in 1906, three years before the flood, Major G. W. Roessler of the Corps of Engineers sent Assistant Engineer David B. Odgen to examine the overflow channel in the area of what today is known as Fischer Island. Ogden's report to Roessler states, in pertinent part:

> "The channel in question is across the neck of a peninsula and is some 3200 feet long, while the distance around by the main river is two and one-quarter miles.
>
> "This channel has existed for a number of years as maps on file in this office show it in practically the same location in 1890, though the mouth of the channel was then closed by a gravel bar. The fall from its head to its foot is noted as about 8 feet. The approximate present location is shown in dotted lines on the sketch herewith."[1]

In addition, the state's witness stated on cross-examination:

> "• • • I would say the best evidence of it [the length of the eroded chute] is the distance shown on the map of 1890 which appears to be a very carefully prepared and well-engineered drawing and I would say that that is the length of the gully that eventually eroded into what is now the bed of the river."

[1] The distance on the sketch accompanying the engineer's report scales at slightly less than the 3200 feet stated in the body of the letter. However, the 1906 sketch did not purport to represent the exact length of the cutoff or overflow channel, only its approximate location.

We find that the best evidence of the length of Fischer Cut at the time of the 1909 flood is the 1890 map, which both parties agreed was carefully prepared and which shows Fischer Cut to be approximately 3200 feet in length.

It is difficult, based on the present record, to correlate the length of Fischer Cut in 1909 to the topography as it existed at the time of trial. We do find, however, that the length of Fischer Cut as it existed in 1909 at the time of the flood is best represented by the channel from point A to point B as shown on the 1890 map. We remand this action to the Court of Appeals with directions to remand to the trial court to correlate points A and B with the present topography of the area. Additional testimony may be taken if necessary. Also, on the remand, the trial court should modify or adjust any damages in accordance with our decision herein expanding the length of Fischer Cut. In all other respects the decision of the Court of Appeals is affirmed.

Affirmed as modified.

APPENDIX B
OPINION OF OREGON SUPREME COURT
No. 1940—July 17, 1975

IN BANC*

STATE EX REL STATE LAND BOARD, *Respondent-Cross-Petitioner, v.* CORVALLIS SAND AND GRAVEL COMPANY, *Petitioner.*

On review from the Court of Appeals.

Upon respondent-cross-petitioner's petition for rehearing filed June 20, 1975, and petitioner's petition for rehearing filed July 3, 1975.

Lee Johnson, Attorney General, W. Michael Gillette, Solicitor General, and Peter S. Herman, Senior Counsel, Salem, for the respondent-cross-petitioner.

Robert Mix, Corvallis, for the petitioner.

PETITIONS FOR REHEARING DENIED; ORIGINAL OPINION CLARIFIED.

HOWELL, J.

In our original opinion we emphasized that we accepted the defendant's petition for review of the decision of the Court of Appeals on the sole issue of the length of Fischer Cut as it existed at the time of the 1909 flood. We held that the length of Fischer Cut as it existed in 1909 was best represented by the channel from Point A to Point B as shown on the 1890 map and remanded the cause with directions to the trial court to correlate Points A and B with the present topography of the area and to modify or adjust any damages accordingly.

Both parties have filed petitions for rehearing. The defendant's petition raises no new matter and is denied. The petition of the plaintiff, the State of Oregon, expresses concern that our opinion could be

* Tongue, J., did not participate in this decision.

interpreted to include as an award to defendant a portion of the riverbed in Parcel 3 which the plaintiff leased to the defendant in 1963 and which defendant has admitted in its pleadings that it had no ownership therein.①

To prevent any misunderstanding, our former opinion is clarified to the following extent: if correlating Points A and B of Fischer Cut results in any portion of that length falling within a portion of the riverbed to which the defendant has disclaimed ownership, then the ownership of plaintiff remains unaffected.

Both petitions for rehearing are denied.

① The plaintiff leased to defendant "That portion of the bed of the Willamette River owned and controlled by the State of Oregon *beginning at its confluence with East River (East Channel of the Willamette River) and extending downstream* 4,000 feet, all in Section 2, Township 12 South, Range 5 West, Willamette Meridian." (Emphasis supplied)

The defendant's amended answer alleged: "Defendant is the owner in fee simple of the property described in defendant's amended complaint, *except that defendant does not own that portion leased by plaintiff to defendant* * * *." (Emphasis supplied)

APPENDIX C

OREGON SUPREME COURT CLERK'S LETTER OF AUGUST 6, 1975 NOTIFYING RESPONDENT (defendant) OF COURT'S DENIAL OF ITS MOTION

LOREN D. HICKS
State Court Administrator

August 6, 1975

Mr. Robert Mix
Attorney at Law
745 N. W. VanBuren
Corvallis, Oregon 97330

Re: State v. Corvallis Sand and Gravel Co.

Dear Mr. Mix:

The Supreme Court today denied respondent's motion to withdraw or suspend clarification of opinion with regard to the above-entitled case.

Very truly yours,

A J
Adell Johnson
Assistant Administrator

AJ/t

cc: Mr. Peter S. Herman
Senior Counsel
100 State Office Building
Salem, Oregon 97310

APPENDIX D

JUDGMENT OF OREGON SUPREME COURT

Entered June 12, 1975

STATE OF OREGON

SUPREME COURT

Mandate

STATE OF OREGON, Acting by and through
the STATE LAND BOARD,
Respondent, Cross-Petitioner,
v.
CORVALLIS SAND AND GRAVEL COMPANY,
an Oregon corporation,
Petitioner.

Appeal from BENTON County
On Review from Court of Appeals

This cause on April 3, 1975, having been duly argued and submitted upon the sole issue arising on defendant's petition for review from the Court of Appeals, and the court having fully considered said issue as well as suggestions of counsel in their argument and briefs finds that the decision of the Court of Appeals should be affirmed as modified.

IT THEREFORE IS ORDERED and ADJUDGED that the decision of the Court of Appeals is affirmed as modified and the cause is remanded to the Court of Appeals with directions to remand to the trial court for

further proceedings in conformity with the opinions of the court herein.

ENTERED at Salem, Oregon, this 12th day of June. 1975.

APPENDIX E

OREGON SUPREME COURT CLERK'S LETTER FEBRUARY 28, 1975 RE ACCEPTANCE OF REVIEW

LOREN D. HICKS
State Court Administrator

January 28, 1975

Mr. Peter S. Herman
Senior Counsel
State Office Building
Salem, Oregon 97310

Mr. Robert Mix
Attorney at Law
745 N. W. VanBuren
Corvallis, Oregon 97330

Re: State ex rel State Land Board v. Corvallis Sand & Gravel Company

Gentlemen:

With Justice Thomas Tongue not participating, the Supreme Court today allowed defendant's petition for review and denied plaintiff's petition for review in the above case.

The matter will be set for argument the first week of March and you will receive later notification of the exact day and time.

Very truly yours,

ADELL JOHNSON
Adell Johnson
Assistant Administrator

AJ/t

APPENDIX F

OPINION OF THE OREGON COURT OF APPEALS

No. 1940—September 9, 1974

STATE EX REL STATE LAND BOARD, *Appellant–Cross-Respondent, v.* CORVALLIS SAND AND GRAVEL COMPANY (No. 21512), *Respondent–Cross-Appellant.*

Appeal from Circuit Court, Benton County.

RICHARD MENGLER, Judge.

Argued and submitted July 15, 1974.

Peter S. Herman, Senior Counsel, Salem, argued the cause for appellant–cross-respondent. With him on the briefs were Lee Johnson, Attorney General, and W. Michael Gillette, Solicitor General, Salem.

Robert Mix, Corvallis, argued the cause and filed the briefs for respondent–cross-appellant.

Before SCHWAB, Chief Judge, and LANGTRY and FORT, Judges.

AFFIRMED IN PART; REVERSED IN PART.

SCHWAB, C. J.

This is an action at law in ejectment by the state pursuant to ORS 105.005, et seq., to recover possession of 11 described parcels of real property constituting portions of the bed of the Willamette River near Corvallis, and to recover damages for the reasonable value of the use of such parcels.

In 1958 the state filed a suit to quiet title to the land adjoining certain lots, which lots constitute a portion of the property in dispute now. In 1959, at trial, the case was dismissed without prejudice on

motion for a voluntary nonsuit for failure of proof. In 1960 the state filed a suit for an accounting and an injunction covering the area in dispute in the case at bar. This case was voluntarily dismissed in 1961 by the state before it was at issue.

The first complaint in this action was filed by the state on June 7, 1965. In the complaint the portion of the riverbed in dispute was described as one parcel; the portions of the riverbed now constituting Parcels 2A, 2B and 2C were omitted. Instead of answering, the defendant filed a complaint in equity seeking to permanently enjoin the state's ejectment action. The state demurred to the complaint. The trial court overruled the demurrer and a decree was entered in favor of Corvallis Sand and Gravel. On appeal the Supreme Court reversed. *Corvallis Sand & Gravel v. Land Board,* 250 Or 319, 439 P2d 575 (1968).

On December 23, 1969, the plaintiff filed its first amended complaint in ejectment in which it described the riverbed it sought to recover as 11 separate parcels and claimed damages for the use of each parcel. On July 7, 1970, the defendant filed its answer, denying the allegations of the complaint and raising 12 affirmative defenses. After procedural disputes leading to several amended answers, trial was held before the court without a jury, commencing October 11, 1971.

On May 25, 1972, the trial court issued a memorandum opinion awarding various parcels to each party and setting the amount of damages for the previous use by defendant of those parcels awarded to the state. Findings of fact and conclusions of law were entered on June 19, 1972. The court supplemented

these findings on July 28, 1972, and judgment was entered the same day. The state appeals from that portion of the order which awards parcels described for the purposes of this litigation as 2A, 2B and 2C to the defendant, on the ground that it erred in finding that these parcels were formed by avulsion, and from the failure of the trial court to award interest on the money judgment from the date of taking by defendant to the date of the judgment. The defendant cross-appeals from a variety of procedural rulings of the court, and the striking of certain of its affirmative defenses, the award of certain parcels to the state, and the award of damages. For the reasons which follow, we affirm the trial court in all its rulings and its judgment with the exception of one relatively minor item of damages which we reverse.

I. Scope of Review

The scope of appellate review of the facts presented in this case was stated in *Reif v. Botz,* 241 Or 489, 496, 406 P2d 907 (1965):

> "* * * On appeal in an action at law from findings of fact by a trial court sitting without a jury, this court cannot again place the evidence on the scales to see which side preponderates. We must confine ourselves to a search of the record for some evidence to support the findings. If we so find * * * those findings cannot be disturbed."

See also, May v. Chicago Insurance Co., 260 Or 285, 490 P2d 150 (1971); *State Highway Com. v. DeLong Corp.,* 9 Or App 550, 495 P2d 1215, Sup Ct *review denied* (1972), *cert denied* 411 US 965 (1973). The various findings of fact as to the formation of the various parcels and the amount of material removed

from each parcel must be reviewed in light of this standard.

Much of the dispute in this case centers around the difference in testimony of the expert witnesses of the parties. The credibility of the various witnesses and the weight to be given to their testimony is a matter for the trial court and will not be passed upon again by this court in a law action. *Armbrust v. Travelers Ins. Co.,* 232 Or 617, 376 P2d 669 (1962).

Finally, we should note that when we state facts in this case, we are using the findings of fact of the trial court in all instances in which there is a conflict in the evidence.

II. Ownership of the Parcels in Dispute

This litigation involves ownership questions of certain parcels of the bed of the Willamette River[1] near Corvallis, Oregon, which parcels lie between ordinary high watermarks in an area bounded by the Mary's River on the north or downstream end, and the City of Corvallis Water Treatment Plant to the south or upstream end. For the purposes of this litigation, the state, in its complaint, divided this section of the river into 11 separate parcels.[2] On appeal, the ownershp of eight of these parcels is in issue.

In order to put the ownership question into perspective, a brief overview of the facts is necessary. Prior to the latter part of 1909, the northerly portion

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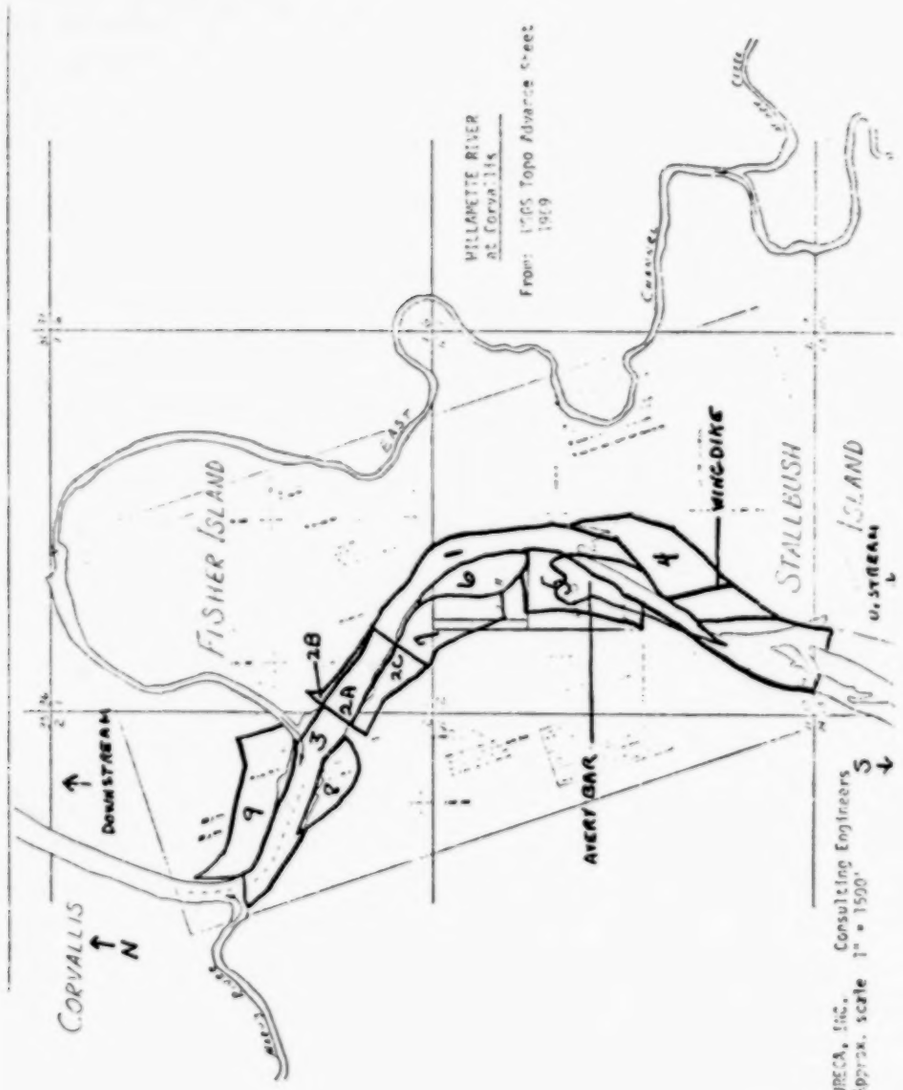
[1] Neither party contests the fact that the Willamette River is navigable in the area involved in this litigation. For a comprehensive view of the geography of the disputed area, *see* map at 1536.

[2] For a discussion of the propriety of splitting the disputed area into separate parcels and causes of action, *see* pp 1564-1566, infra.

of the Willamette River now shown on the attached map as the East Channel was the main channel of the river. Prior to 1909 the main channel veered to the east from a point just south of what is shown as Parcels 2A, 2B and 2C, went around the east side of Fischer Island and rejoined what is now the main



channel at a point to the northwest of Parcels 2A, 2B and 2C. The area shown on the map as Parcels 2A, 2B and 2C, and described as the Fischer Cut area was a minor non-navigable channel which was submerged only seasonally. However, following a storm and flood in late 1909, the area known as Fischer Cut became the main channel of the river and the East Channel gradually became non-navigable.

With regard to Parcels 2A, 2B and 2C, the issue involves the consequences of this change of channels, with the state claiming ownership by virtue of its sovereignty over navigable waters and the application of an erosion principle. The defendant contends that the change was actually avulsive and that, in any event, the state's sovereignty does not extend to the bed of the river included within these parcels.

With regard to other of the parcels the issue is who was holder of the original title. Finally, with some parcels, the issue arises because of formations of islands within the bed of the river, accretions thereto, removal of gravel deposits by the railroad, the construction of a wingdike in 1948 by the Army Corps of Engineers, and the general erosive and accretive processes of the river over the course of time.

The trial court awarded Parcels 2A, 2B and 2C to the defendant, and all the others to the state. Both parties raise a variety of factual and legal contentions in opposition to the findings and conclusions of the trial court. We will treat each parcel separately recognizing that, to some degree, the factual discussion as to each parcel will overlap somewhat the general discussion above.

A. Parcels 2A, 2B and 2C (Fischer Cut)

As indicated on the map, Parcel 2A is comprised of bottom land of the Willamette River between ordinary low water. Parcel 2B is riverbed between ordinary high and ordinary low water on the right bank of the river. Parcel 2C is riverbed between the ordinary high water and ordinary low water on the left bank of the river. The trial court made the following findings of fact concerning the area within the Fischer Cut:

"1. Fischer Island from 1853 to 1909 was a peninsula-like formation around which the Willamette River coursed.

"2. By 1890 a clearly discernible overflow channel over the neck of the peninsula had developed known as Fischer Cut.

"3. In 1890 Fischer Cut would have had to be cleared of driftwood and willow growth before it could possibly accommodate the flow of the river. The Fischer Cut Channel was dry at low water, or below the five-foot stage, and carried water only at intermediate or high stages of the river.

"4. In January of 1906 the Fischer Cut Channel was in practically the same location as it was in 1890. It was estimated then that roughly one-quarter of the flow of the river was carried through Fischer Cut.

"5. Between 1890 and 1909 the high water overflow through Fischer Cut did not sufficiently clear Fischer Cut to allow for the full flow of the river and the river continued to flow around Fischer's Island during that period.

"6. As the result of a flood of November 25, 1909, the river suddenly and with great force and violence converted Fischer Cut into the main channel of the river.

"7. The change was not gradual and imperceptible but was a rapid and violent change of course, avulsive in character and constituted an avulsion.

"8. Parcels 2A, 2B and 2C combined are included in the area known as Fischer Cut."

The state argues that ownership of the entire Fischer Cut area passed to the state by virtue of its sovereignty over navigable waters regardless of the manner of the formation of the cut. It also argues that regardless of the state's sovereignty, title to the Fischer Cut river bottom passed to the state because the Fischer Cut did not result from an avulsive change since an existing channel of the river was present prior to its enlargement. Defendant argues that the change was avulsive and that, in any event, *Bonelli Cattle Co. v. Arizona,* 414 US 313, 94 S Ct 517, 38 L Ed 2d 526 (1973), controls the ownership question.

1. The Sovereignty Issue

Under the equal-footing doctrine, as new states were admitted to the Union, they entered with the same rights, sovereignty and jurisdiction as the original states possessed within their respective borders. Accordingly, under the equal-footing doctrine, title to the lands beneath navigable waters passed from the federal government to the state of Oregon upon its admission to the Union. *Bonelli,* 38 L Ed 2d at 534; An Act for the Admission of Oregon into the Union, ch 33, 11 Stat 383. Further, under the Submerged Lands Act, 43 USC § 1301 (a) (1), the federal government quitclaimed all federal title to lands beneath navigable streams, as modified by accretion, erosion or reliction. By virtue of its sovereignty over navigable

waters, the state contends that its title to the bed of the Willamette River follows the course of the river wherever it may move. Otherwise, the state argues, the bed will become a "checkerboard" of public and private ownership, seriously impairing the public use of the waters.

Questions of title to beds of navigable rivers must be evaluated in light of *Bonelli Cattle Co. v. Arizona,* supra. In *Bonelli,* the Supreme Court recognized the principle that it would be left to the states to determine what rights they would accord riparian owners in the beds of navigable streams which under federal law belong to the state. However, the question of how far the state's sovereign right extends under the equal-footing doctrine and under the Submerged Lands Act was found to involve a question of right asserted under federal law and, thus, federal common law would apply.

While *Bonelli* involved title to lands formerly under the main channel that had since become dry, the basic public policy discussion is equally applicable to the case where certain lands which were not under water are presently under water. The court in *Bonelli* first noted that, historically, title to the beds beneath navigable waters is held by the sovereign as a public trust for protection of navigation and related purposes. The court continued:

> "'Such waters • • • are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing • • •.' Shively v. Bowlby • • •

> [152 US 1, 11, 38 L Ed 331, 14 S Ct 548 (1894)]."
>
> "The State's title is to the 'riverbed as a bed' • • •." *Bonelli Cattle Co. v. Arizona,* supra, 38 L Ed 2d at 536.

The fundamental purpose of the original grant involves navigational and related interests and the state can often protect these interests by holding a navigational servitude rather than by holding title to the bed.[9]

While the extent of the state's interest should not be narrowly construed because it is denominated a navigational purpose, *see, Bonelli Cattle Co. v. Arizona,* supra, n 15, the implication is clear that the other purposes must somehow be related to the navigational purpose. The only public purpose cited by the state deals with the question of public recreation in terms of wading, fishing, boating or swimming. However, such rights can be controlled under the navigational purpose doctrine, and title to the bed, asserted here only for the extraction of royalty payments, is not necessary. Certainty of title and other arguments raised by the state under its sovereignty argument do not relate to this legitimate state interest in control of navigation and fishing.

The first portion of *Bonelli* thus stands for several basic propositions. First, the extent of title to submerged lands and navigable waterways must be determined by federal common law. Second, the state's

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[9] The court directs the reader to Note, *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion,* 14 Ariz L Rev 315 (1972), wherein the author speaks in terms of title being burdened with the state's "navigational easement." *See,* Bonelli Cattle Co. v. Arizona, 414 US 313, 94 S Ct 517, 38 L Ed 2d 526, 536, n 12 (1973).

interest in the bed of navigable waters is basically that of the control of navigation, fishing and other related public goals. So the sovereignty principle alone will not support title of the state in these parcels. Thus we must turn to *Bonelli* and other federal cases to determine whether title to the bed passed to the state under the facts presented in the case at bar.

2. Nature of the Change in the River's Course

The court in *Bonelli* first noted that federal law recognizes the doctrine of accretion whereby the grantee of land bounded by a body of navigable water acquires a right to any gradual accretion formed along the shore. The court then discussed a number of interrelated policy reasons for the application of doctrine of accretion, which reasons refer to the risk a riparian owner runs that his land could be eroded by the action of the adjoining waterway. Under the court's analysis loss of land on a navigable waterway by a riparian owner to erosion would result in title to the bed passing to the state. *See, Bonelli Cattle Co. v. Arizona,* supra, 38 L Ed 2d 534, 536-37.

As defined in *Bonelli,* 38 L Ed 2d at 538, and other federal cases,[4] the doctrine of accretion requires the gradual, imperceptible accumulation of land on a navigable river bank. As found by the trial court and admitted by the state, there was no gradual addition or accumulation of land in this case. Rather, the river started to flow through a new channel. Since the accretion doctrine does not apply, the question is what this change to a new channel is denominated under

[4] *See,* Philadelphia Co. v. Stimson, 223 US 605, 32 S Ct 340, 56 L Ed 570 (1912).

federal common law and how such a change affects title to the riverbed.

One possibility is that this change was avulsive, as found by the trial court. As defined in *Bonelli,* 38 L Ed 2d at 539, an avulsion occurs where a stream suddenly and perceptibly abandons its old channel. Other federal cases state that such change must be visible in its progress. *See, St. Louis v. Rutz,* 138 US 226, 11 S Ct 337, 34 L Ed 941 (1891). Such an avulsive change does not affect title to the lands submerged by the water since this is not one of the risks run by a nonriparian landowner. *Bonelli Cattle Co. v. Arizona,* supra; *Philadelphia Co. v. Stimson,* 223 US 605, 32 S Ct 340, 56 L Ed 570 (1912); *St. Louis v. Rutz,* supra. While title does not change, the submerged lands do become subject to the public right of navigation, fishing and other related public purposes. *See* discussion, supra, at 10-11. The trial court found that the change in the Fischer Cut area was sudden and perceptible and, thus, constituted an avulsion. We find evidence in the record to support this conclusion.[5]

But even if the doctrine of avulsion does not adequately fit the facts in the case at bar, there is a middle course between the avulsion and accretion doc-

[5] The state relies heavily upon Purvine v. Hathaway, 238 Or 60, 393 P2d 181 (1964), to support its position that this change was not avulsive in nature. First, it should be noted that federal common law controls ownership questions under *Bonelli* and, thus, state cases are of limited applicability. Second, *Purvine* did not involve the question of the state's ownership of the riverbed but rather involved boundary questions. Finally, the court found that an avulsive change had not been proved on the facts and that, for policy reasons, the court did not wish to apply the avulsion theory because of the effect that theory could have on boundary questions in the future.

trines which perhaps more accurately reflects the facts presented. This is the so-called exception to the accretion rule announced in *Commissioners v. United States,* 270 F 110, 113-14 (8th Cir 1920):

> "• • • [The accretion rule] is applicable to and governs cases where the boundary line, the thread of the stream, by the slow and gradual processes of erosion and accretion creeps across the intervening space between its old and its new location. To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream • • •."

While the court treated this as a form of accretion, the result is the same as avulsion in that the boundary line was found not moved to the new main channel but rather remained in the old main channel. In fact, at least one court claims that the rule in *Commissioners* was a rule of avulsion. *See, Durfee v. Keiffer,* 168 Neb 272, 95 NW2d 618 (1959). The rule of *Commissioners*

was apparently recognized in *Kansas v. Missouri,* 322 US 213, 64 S Ct 975, 88 L Ed 1234 (1944).

Since the rule of *Commissioners* yields the same outcome as the avulsive theory, the same result would apply as to the title of the newly submerged lands, namely, that it remains in the former owner and does not pass to the state. The government will hold the paramount navigational servitude, but will not become the owner of the submerged lands.

3. Conclusions

There are several conclusions we distill from *Bonelli* and other cases dealing with navigable waterways. First and most important is that the state's right in the bed of the river is a limited right and relates to a navigational or related purpose. Lands granted to the state of Oregon upon its admission in 1859 which were under water and are still under water belong to the state of Oregon at this time. While the grant of the bed in 1859 is not absolutely necessary for the paramount public purpose of control of navigation, it was, perhaps, the way the Congress felt the question of title to riverbeds should be determined. It can also be determined from *Bonelli* that where a bed of a river shifts by a slow process of erosion or accretion, title of the state to the bed of the river follows the change. However, where there is an avulsive change or a change that, under *Commissioners,* is treated like an avulsive change, the state does not obtain title to land under the water as it presently flows. The state's interest in navigation and other related purposes does not extend to a need for ownership of the riverbed.

Adequate evidence was introduced to support either the theory of avulsion as found by the trial court or a situation similar to that in *Commissioners*. But under either theory, the outcome is the same—the ownership of the land under the river does not change. The ownership of the overflowed lands in Parcels 2A, 2B and 2C remains with the owner of those lands before the changes of 1909, subject only to the paramount navigational servitude held by the state. This portion of the judgment of the trial court is affirmed.

B. Parcel No. 1

Parcel No. 1 lies between the present lines of ordinary low water with its upstream limits delineated by a line at right angles to the river and opposite the City of Corvallis Water Treatment Plant, and its downstream limits coinciding with the upstream limits of Parcel 2A. The trial court ruled that Parcel 1 belonged to the state. There are three separate issues involves in the ownership question of Parcel No. 1: (1) the length of the Fischer Cut; (2) the ownership of an area denominated the Avery Bar; and (3) the effect of the U.S. Army Corps of Engineers' wingdike. These will be treated separately.

1. Length of the Fischer Cut

The defendant contends that the change of 1909, which it terms an avulsion, extended a distance of 3200 feet upstream from the downstream ends of Parcels 2A, 2B and 2C, and, therefore, included a portion of Parcel 1. The trial court ruled that the Fischer Cut did not extend upstream above Parcels 2A, 2B and 2C. However, the court did find that a small portion of Parcel 3 was included within the limits of Parcels 2A,

2B and 2C. This makes the cut area approximately 1600 feet in length. There is ample evidence both in the maps and in testimony of the state's expert witness to support this finding. The cut did not extend into Parcel 1.

2. The Avery Bar Issue

The Avery Bar area extends from Parcel 5 through Parcel 1. The defendant contends that when the Avery Bar was removed for gravel purposes by the railroad in the early twentieth century, the river moved back in over the excavated land. It argues that Avery Bar arose as an accretion from Parcels 5 and 6 which the defendant also contends it owns and, as such, when it was covered by water, it still belonged to the defendant. The trial court made the following finding of fact:

"• • • • •

"3. Prior to 1913, a large portion of Parcel 1 consisted of a formation known as Avery Bar.

"4. That portion of the bed of the Willamette River occupied by Avery Bar was not a part of Fischer Cut, discussed under Parcels 2A, 2B and 2C.

"5. Prior to 1913, Avery Bar originated as an island on the bed of the river below the lines of ordinary low water.

"6. Subsequently and by accretion, prior to 1913, the island joined the uplands on the left bank at the ordinary low water mark in front of government lots 9 and 10 [Parcel 5].

"7. Thereafter, a point bar developed on top of the joinder.

"8. Thereafter, the railroad in 1913 removed most of the bar by dredging large quantities of rock and gravel.

"9. The state owned from ordinary high water mark to ordinary low water mark in front of government lots 9 and 10 [ownership of these lots discussed infra at 1551-1553].

"10. The point bar, known as Avery Bar, accreted to land owned by the state, that is, to the island which had originated in the bed of the river below ordinary low water.

"11. Therefore, it is not material whether the accreted mass became covered with water from whatsoever cause, be it the wingdike constructed by the Corps of Engineers in 1948, discussed under Parcel 4, or the dredging of Avery Bar by the railroad in 1913-1914."

It is established that if an island or dry land forms upon that part of the bed of a river which is owned in fee by the riparian proprietor, the same is a property of said riparian proprietor. *St. Louis v. Rutz,* supra, 138 US at 245. Further, the owner of an island is entitled to land added thereto by accretion. 65 CJS 261, Navigable Waters § 82 (6).

Once again the facts settle into separate positions taken by the parties' expert witnesses. The state's witness claimed that the Avery Bar started as an island and that the deposits accreted to the island. The defendant's witness, on the other hand, contended that Avery Bar was an accretion to the uplands, namely Parcels 5 and 6, which the defendant claims it owns. There is evidence to support the trial court's finding and it is affirmed.

3. 1948 Corps of Engineers' Wingdike Formation

Much of this argument overlaps the Avery Bar argument, supra. The defendant contends that a wingdike constructed by the Corps of Engineers in 1948 further covered part of Parcel 1 made up of the Avery Bar area. It again argues that Avery Bar was an accretion to the uplands which the defendant owned and that the avulsive change caused by the wingdike allowed ownership of the land of Avery Bar to continue in defendant. The trial court's finding of fact in the matter is set out in full, supra. There is evidence to support these findings.

C. Parcel 3

Parcel 3 lies in the bed of the river between ordinary low watermarks and runs from the upstream end of Parcel 2A past the confluence with the East River to a point approximately equal to the confluence with Mary's River. On July 1, 1963, the state leased to the defendant for a term of ten years that portion of Parcel 3 beginning at the confluence with the East River and extending downstream for approximately 4,000 feet. The trial court split Parcel 3, awarding the downstream portion from the confluence with the East River to the state, and the upstream portion from the confluence of the East River to the defendant, finding that it was within the Fischer Cut. The state appeals from that portion of the decree awarding the area upstream of the East River to defendant. There is evidence supporting a finding that the portion upstream from the confluence of the East River was included within the Fischer Cut. Under *Bonelli* and related cases, title to that land remained in the original owner.

D. Parcel 4

On appeal, defendant has abandoned all claim to this parcel so it need not be discussed herein.

E. Parcel 5

Parcel 5 lies in the bed of the river between the lines of ordinary high and ordinary low along the left bank of the river. The trial court awarded this parcel to the state below the ordinary high watermark. The defendant argues:

1. That the northerly one-third of Parcel 5 is included in the avulsive change of Fischer Cut;

2. That a portion of Parcel 5 is included in the Avery Bar area; and

3. That the Corps wingdike of 1948 was an artificial change of channel which worked no change of title, and was an artificial avulsion.

The trial court made the following findings of fact:

> "1. Parcel 5 lies in the bed of the river between the lines of ordinary high and ordinary low along the left bank of the river.
>
> "2. Inasmuch as Parcel 5 fronts government lots 9 and 10, defendant's predecessors in title acquired no right therein under laws of 1874, page 76."

The question of the length of the Fischer Cut and the formation of the Avery Bar has already been discussed above. There is evidence to support the trial court's ruling that Parcel 5 was not within the avulsive change and that the Avery Bar did not form as an accretion to Parcel 5.

There are still several portions of Parcel 5, however, that do not fall in either the Fischer Cut or Avery Bar category. The question to be resolved as to these areas involves a United States patent to certain lands and Acts of the Oregon legislature in 1874 and 1878.

In 1874, the legislature granted the area on the Willamette River between low and high water to adjacent riparian owners. General Laws of Oregon 1874, p 76.

In 1875, defendant's predecessor in interest, one Norring, filed for a homestead on Government Lots 9, 10 and 12; Parcel 5 is the area between high and low water fronting Lots 9 and 10. On October 18, 1878, the Governor signed a law repealing the statutory grant of land between high and low water on the Willamette River. General Laws of Oregon 1878, § 34, p 54. The patent to Government Lots 9 and 10 was not issued to Norring by the United States government until April of 1882. The question thus presented is whether Norring was an "owner" within the contemplation of the Oregon statute when he settled on the property in 1875 and, if not, did the patent obtained in 1882 relate back to his original entry in 1875 rendering him an owner within the contemplation of the statute.

In support of his contention that Norring was an "owner," defendant relies upon *Faull v. Cooke,* 19 Or 455, 26 P 662, 20 Am St R 836 (1890), in which the court determined what rights a homesteader acquired in land by virtue of his homestead settlement and subsequent compliance with the Act of Congress granting homesteads to actual settlers upon the public lands of the United States and the issuance to him of a patent therefor by the United States. In *Faull* the court found that a homestead patent related back to the date of settlement. However, the question here concerns not homestead rights but the granting of the state lands between high and low water to the owner of riparian lands bordering thereon. *State v. McVey,* 168 Or 337,

121 P2d 461, 123 P2d 181 (1942), speaks more nearly to the point. In *McVey* the court considered the question of ownership of a gravel bar between high and low water. The court first noted that General Laws of Oregon 1874, p 76, did not vest title in the bed between high and low water in the federal government. The court then construed the statute and tried to determine the intent of the legislature and the historical background of the legislation. The court first noted in *McVey,* 168 Or at 353-54:

> "* * * It was undoubtedly due to the fact that many riparian owners along the Willamette, Coos, Coquille and Umpqua rivers had treated the river beds between high and low water marks as private property and had sometimes improved such parts of the river beds by the erection of expensive structures, that the legislature amended the 1872 enactment so as to protect them and their investments by making a grant of the beds of those rivers above low water mark to the riparian owners * * *.
>
> "The legislature was concerned with private ownership of property abutting upon tide lands and property adjacent to the beds of certain designated navigable rivers. It was not concerned with the United States as owner of any such lands. * * * It may be noted * * * that the act did not grant to a settler the right to purchase the tide land until *after* he had received a patent from the federal government." (Emphasis supplied.)

Norring did not become an "owner" until after he had received the patent from the federal government. Since he did not receive the patent until after the date of the repeal of the Act authorizing him to obtain ownership of the land between high and low watermarks, he was not an "owner" within the terms of the statute.

The defendant's second argument is that the patent received by Norring in 1882 related back to his entry on March 15, 1875, when the statute granting ownership to the low water level was in effect. Defendant again cites numerous cases involving homestead law in which the patent does relate back to the date of entry insofar as it cuts off a title of one who enters after the original entryman. As made clear in *State v. McVey,* supra, the disposition of these lands is controlled by state law, and the doctrine of relation back will not apply.

Defendant makes reference to ORS 105.070 in support of his relation back claim. That statute declares that in an action at law for the recovery of the possession of real property, if either party claims the property as a donee of the United States under the Donation Law, such party from the date of his settlement on the property is deemed to have a legal estate and fee in the property. This statute originated in 1862 in General Laws of Oregon, § 329, p 230 (Deady 1845-1864), well before the statutes in question here and the decision in *State v. McVey,* supra. Also, this refers to lands owned by the United States government and passed under the homestead acts. It does not control the later state legislative enactments dealing with the state's land between high and low water.

F. Parcel 6

Parcel 6 also lies in the left bank of the river and consists of land between ordinary high and ordinary low water. Defendant contends that Parcel 6 is in actuality Government Lot 11 of Section 12 which was patented by the defendant's predecessor in title

before the repeal of the 1874 statute. The state admits that the patent on Government Lot 11 was completed prior to the repeal of the laws of 1874, but contends that Government Lot 11 has eroded away completely and that Parcel 6 arose from an island in the river that joined by accretion to the uplands.

The trial court made the following findings of fact:

"1. Parcel 6 lies in the bed of the river between the lines of ordinary high and ordinary low water along the left bank of the river.

"2. Parcel 6 is not within the avulsive channel of Fischer Cut.

"3. Defendant's predecessor in title acquired no right therein by virtue of Laws of 1874, p. 76.

"'4. Parcel 6 formed in the bed of the river after 1878 and accreted to the uplands at the low water mark on the frontage of government lots 10, 11 and 12 of Section 12. The accreted formation cut off the submersible lands fronting what remained of Government Lot 11.'"

Both parties agree that defendant's predecessor in title acquired rights in Government Lot 11 and the submersible lands fronting it, so paragraph 3 of the findings of fact is incorrect. However, there was adequate evidence introduced to support the finding that Government Lot 11 eroded away and that Parcel 6 formed in the bed of the river and accreted to the uplands. So long as this parcel remains submersible, title will remain in the state. *See, Bonelli Cattle Co. v. Arizona,* supra.[6]

[6] The court in *Bonelli* adopted the doctrine of re-emergence:

"Under the doctrine of re-emergence, when identifiable riparian land, once lost by erosion, subsequently re-emerges

(Continued on page 57)

G. Parcel 7

Parcel 7 is in an area between ordinary high and ordinary low water on the left side of the river. It consists of part of Government Lot 13, Section 12, and the Alexander Donation Land Claim. The defendant contends on appeal only that Parcel 7 was within the alleged avulsive change of 1909 occurring in the Fischer Cut area and, therefore, should belong to the defendant. The trial court found that it was not within the cut. There is evidence to support this finding.

III. Procedural Questions Relating to Damages

The defendant raises several assignments of error relating to the damages awarded by the court for those parcels given to the state. The defendant first contends that the state's failure to use an *ad damnum* clause in its pleading required the trial court to exclude all evidence on damages. This contention was decided adversely to defendant's position by *Hollopeter v. Palm,* 134 Or 546, 550, 291 P 380, 294 P 1056 (1930),

(Continued from page 56)

as a result of perceptible change in the river course, title to the surfaced land revests in its former owner * * *. The re-emergence doctrine has been accepted by a number of States * * *. Because of the limited interest of the State in the former riverbed, we have held the doctrine of avulsion inapplicable to this suit between the State and a private riparian owner, who is seeking title to surfaced land *identifiable as part of his original parcel.* In that sense, we have embraced the re-emergence concept." (Emphasis supplied.) 38 L Ed 2d at 541, n 28.

In the case at bar, no evidence was introduced to show that any portion of Government Lot 11 was above ordinary high water. To the extent that a portion of Lot 11 is now emerged or re-emerges in the future, title to that portion could return to the defendant. For possible limitations on this return of title, *see,* Annotation, 41 ALR 395 (1926). On the facts as presented, we need not settle that question now.

appeal dismissed 284 US 572 (1931), wherein the court concluded that the entire omission of the *ad damnum* clause was immaterial where, as here, after a cause of action is set out there is a prayer for a specified amount.

Defendant also argues that the court erred in denying its motion to exclude evidence from the case on damages which occurred after the filing of the complaint in the original case in June of 1965. Damages in ejectment proceedings are provided for by ORS 105.030, which statute specifically permits the recovery of damages from the date of the commencement of the action to the giving of a verdict.

The defendant next contends that the court erred in denying its motion to exclude evidence relating to quantities of gravel dredged from the river. Defendant claims that since the state has pleaded as the measure of damages the reasonable value of the use of the premises for each year or, as admitted by defendant, rental value, it cannot introduce proof as to amount of gravel removed since that does not relate to rent. However, it is noted in Newell on Ejectment, ch XIX, § 3, 606-07 (1892):

> "*Whatever* would be rent, as between landlord and tenant, is mesne profits as between the parties in ejectment. But these profits frequently include matters which would hardly be termed rent as between landlord and tenant * * *." (Emphasis supplied.)

Accord, Crane v. Oregon R. & N. Co., 66 Or 317, 328, 133 P 810 (1913). Mesne profits are defined as the rents and profits or the value of the use and occupation of the real property recovered in an action of ejectment for the period during which the property has been wrongfully withheld. Newell, supra, § 2.

There are numerous cases which find that royalty payments pursuant to a lease would constitute mesne profits or rent in an ejectment action. *See, United States Steel Corporation v. United States,* 270 F Supp 253, 259 (SD NY 1967), *aff'd* 445 F2d 520 (2d Cir 1971), *cert denied* 405 US 917 (1972); *Moragne v. Doe, ex dem. Moragne et al.,* 143 Ala 459, 39 So 161, 111 Am St R 52 (1904); *Barnard v. Jamison,* 78 Cal App2d 136, 177 P2d 341 (1947).

Finally, under ORS 274.530, when the state leases its submersible and submerged lands in navigable streams, the lease is not payable in a lump sum but only on the basis of a price per cubic yard or ton for the material removed. Under the statute, "rent" would be the same as "royalties" and these would be determined on the basis of the total amount of material removed from the river.

In sum, where, as conceded by defendant, the state pleaded lost rent as its damages in an ejectment action, it would be able to show the value of that lost rent through the use of royalties based upon the total amount of material removed from the river.

IV. Amount of Damages

Defendant contends that the court erred in allowing any damages to the state because such damages were speculative and also that the court erred in awarding any damages to the state for the removal of sand and gravel from Parcel 3 as there was no substantial evidence to support the same. The trial court

made the following determinations in regard to damages:

"1. Plaintiff is entitled to recover damages for the period of six years immediately preceeding [sic] the filing of the original complaint herein until date, namely, from June 7, 1959, to date.

"2. Defendant is not entitled to an offset for 'avoidable consequences' or for failure to mitigate damages.

"3. Plaintiff is entitled to damages at 12.5 cents per cubic yard of materials removed, which the Court finds would have been a reasonable sum to be paid as royalty during the entire period of wrongful withholding.

"4. Plaintiff is entitled to damages upon the total amount of minerals taken within the low-high water boundaries as established by this Court.

"5. With respect to materials that were removed, the Court finds as follows:

"(a) 574,000 cubic yards of minerals were removed from Parcel 1.

"(b) 56,000 cubic yards of minerals were reremoved from Parcel 3. The materials so removed were not subject to the lease between the parties and were in addition to the materials removed by the defendant from Parcel 3, which were subject to the terms of the lease between the defendant and the plaintiff.

"(c) No material was removed from Parcel 4.

"(d) 9,000 cubic yards of minerals were removed from Parcel 5.

"(e) 21,000 cubic yards of minerals were removed from Parcel 6.

"(f) No minerals were removed from Parcel 7.

"(g) The total amount of minerals removed from plaintiff's property was 660,000 cubic yards.

"B. Conclusions of Law

"1. Plaintiff is entitled to recover damages in the amount of $82,500 from the defendant.

"2. The damages are unliquidated and plaintiff is entitled to interest only from the date of Judgment."

The state's witness testified that the royalties for the material removed ranged from 10 cents per cubic yard to 15 cents per cubic yard in the period of time during which the material was removed. There is thus evidence to support the cubic yard royalty figure established by the court. To establish the amount of damages, the state first introduced evidence dealing with the amount of gravel removed by three independent contractors. Records of the amounts dredged by the Joe Bernert Towing Company were furnished by the defendant to the state's fiscal auditor at the Division of State Lands. These records indicated the number of cubic yards removed during each year of the period 1963-1968 (with the exception of 1966 wherein no material was removed by this independent contractor). Evidence was also introduced dealing with the amount removed by the Willamette Tug and Barge Company based on the number of buckets removed during a given period in 1960 and the average number of cubic yards removed per bucket. Finally, Mr. Alfred Millar testified that he had dredged approximately 40,000 cubic yards from the river. Proof as to location of material taken by the independent dredge operators was based on aerial photographs marked by the

witnesses as to locations of removal, and estimates of quantities removed between low watermarks in each parcel and between high water and low watermarks.

Proof was also introduced of the amounts of gravel taken by defendant with its own equipment and personnel. The defendant furnished the state its ledger records which had been prepared on a monthly basis for the period July 1, 1959, to December 31, 1970. Raw production totals of materials were shown from the year 1959 through 1970. The state then estimated that at least 50 percent of the amount of the raw materials production came from the riverbed. Adequate evidence was introduced to support this 50 percent figure.

Combining the figures introduced, the following totals were obtained: Parcel 1: 757,588.3 cubic yards (the trial court found 574,000 cubic yards had been removed); Parcels 2A, 2B and 2C: 104,964.9 cubic yards (the trial court awarded these parcels to the defendant); Parcel 3: 120,468.6 cubic yards (the trial court found that 56,000 cubic yards had been taken out prior to July of 1963); Parcel 5: 11,506.4 cubic yards (the trial court found 9,000 cubic yards had been removed); Parcel 6: 26,427.1 cubic yards (the trial court found that 21,000 cubic yards had been removed).

There is evidence to support the trial court's finding in regard to Parcels 1, 5 and 6.

There is a substantial question raised with regard to Parcel 3. While the evidence introduced by the state showed that over 120,000 cubic yards had been removed, the state makes no claim for these amounts since they relate to material taken subsequent to July 1, 1963,

and thus were covered by the lease between the parties. The state, however, argues that the trial court's award of 56,000 cubic yards should be affirmed on the basis that if the court chose to disbelieve defendant's testimony that it had not dredged in the area of Parcel 3 prior to July 1, 1963, the court was certainly at liberty to do so. There is no evidence in the record to support the assertion that any materials were taken from Parcel 3 prior to July 1, 1963, the effective date of the lease, let alone the 56,000 cubic-yard total found by the trial court. The fact that defendant admitted operating in certain portions of the river does not form an adequate basis for the conclusion that it removed the amount found by the trial court prior to July of 1963. This portion of the judgment must be reversed.

V. Interest on Damages

The trial court awarded the state $82,500 in damages for the reasonable value of the use of plaintiff's premises by defendant for the period June 7, 1959, to May 19, 1972. Interest was awarded only from the date of judgment because the damages were "unliquidated." The state contends that it was entitled as of right to interest as part of its damages.[9]

The majority of jurisdictions allow interest as part of the damages for the detention of land in ejectment and other actions to gain possession of the land,

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[9] Interest is provided by ORS 82.010:

"(1) The legal rate of interest is six per cent per annum and is payable on:

"* * * * *

"(b) Judgments and decree for the payment of money from the date of the entry thereof unless some other date is specified therein * * *."

such interest to run from the date of taking. Annotation, 36 ALR2d 337, 354 (1954). However, the Oregon courts have specifically stated in *Meyer v. Harvey Aluminum,* 263 Or 487, 501 P2d 795 (1972), that interest is not allowable on unliquidated damages. Damages are unliquidated

> "* * * where they are an uncertain quantity, depending on no fixed standard, referred to the wide discretion of a jury, and can never be made certain except by accord or verdict." 25 CJS 615, 626, Damages § 2.

While it is not always easy to categorize damages as "liquidated" or "unliquidated," we hold that in the case at bar the damages fall into the "unliquidated" category. In *Rose City Transit v. City of Portland,* 99 Adv Sh 1187, — Or App ——, — P2d — (1974), we allowed interest from the date of the taking of the property in question. However, in *Rose City,* unlike in the case at bar, the amount and nature of the property taken, the time of taking and the ownership prior to the taking were not at issue. Here, there was active litigation on the amount and location of gravel removed and the ownership of the bed from which the gravel was removed, as well as the value of the gravel removed. In light of all these factors which had to be determined by the finder of fact, it cannot be said that these damages were a sum to be paid in lieu of performance of the contract. *See, Medak v. Hekimian,* 241 Or 38, 404 P2d 203 (1965). This portion of the trial court's order is affirmed.

VI. Deposition of the State's Expert

On September 20, 1971, defendant filed a motion seeking an order directing that defendant be able to

take the deposition of Ronald McReary, the state's expert witness. Defendant further requested that the expert answer all questions put to him relative to the issues of the case and particularly his opinions as to the grounds on which the state claimed ownership of each of the parcels of real property described in the complaint. Further, defendant sought to have the expert produce for examination all physical material, reports, photographs, and other physical evidence from which he obtained such facts forming the basis of his opinion. Argument on the motion was heard on September 24, 1971. However, defendant has not designated the transcript of said arguments as part of the record before this court. The trial court denied defendant's motion to depose the expert, but did allow it to have access to relevant supporting data and information upon which the expert based his opinion.

Depositions of expert witnesses are allowed by ORS 45.151. However, the right to take a deposition may be limited:

> "After notice is served for taking a deposition upon motion seasonably made by any party * * * and upon notice and for good cause shown, the court in which the action, suit or proceeding is pending may make an order that the deposition shall not be taken * * * or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters * * *." ORS 45.181.

It is clear that the federal rules of civil procedure relating to discovery and depositions served as a model for the Oregon rules. *Richardson-Merrell, Inc. v. Main,* 240 Or 533, 402 P2d 746 (1965). Under the federal rules, and, thus, by implication the Oregon

rules, the granting or denial of a protective order is within the discretion of the trial court. *See,* 8 Wright and Miller, Federal Practice & Procedure 267, § 2036 (1970). And, since it is discretionary, only an abuse of that discretion would be cause for reversal. *General Dynamics Corp. v. Selb Manufacturing Co.,* 481 F2d 1204 (8th Cir 1973). In the absence of a transcript of the oral argument or a showing of a basis of the court's ruling, there is no way this court can say that the trial court abused its discretion and that "good cause" has not been shown.

VII. Splitting of Area into 11 Parcels

In its original complaint, the state described the disputed property as one tract. In its first amended complaint the state split the disputed property into 11 separate parcels and alleged a separate cause of action as to each parcel. The defendant moved to strike the first amended complaint, demurred to it and set up as affirmative defenses both in bar and abatement of the state's alleged arbitrary splitting of a single cause of action.

The "splitting of a cause of action" consists in the commencement of an action for only a part of a cause of action. *Wood et ux v. Baker et ux,* 217 Or 279, 284, 341 P2d 134 (1959). And, as a general rule, an entire cause of action cannot be divided to be made the subject of two or more actions. 1 Bancroft, Code Practice and Remedies 586, § 384 (1927). One reason for the general prohibition against the splitting of a cause of action is stated in 1 Bancroft, supra at 586-87:

> "• • • If the rule were otherwise, one could split his demand into innumerable parts, thereby multiplying litigation and adding indefinitely to the costs. Moreover, the law does not favor a multiplicity of suits, and requires that all the matters in controversy between parties which may fairly be included in one action be so included."

Accord, Wood et ux v. Baker et ux, supra. Likewise, in *Coos Bay Oyster Coop. v. Highway Com.,* 219 Or 588, 348 P2d 39 (1959), cited by defendant, the court notes that:

> "• • • Allowance of separate actions for fractional claims would inevitably result in the pyramiding, duplicating and overlapping of damage items to the detriment of the condemnor • • •." 219 Or at 594.

Defendant contends that the state's splitting of its case into 11 separate claims made the case unduly complicated, and was done solely for the convenience of the state's expert witness. Applying the policy reasons for avoiding the splitting of a cause of action to the facts of this case, it becomes clear that none of the hazards sought to be protected against were present here. First, all of these causes of action were presented in a single complaint, so there was no danger of the defendant's being harassed by a multiplicity of suits. At the conclusion of the lawsuit, the limits of the property in question, its ownership, and damages, would be determined. As the court noted in *Wood et ux v. Baker et ux,* supra at 285, where there is no question of a multiplicity of suits there is no violation of the rule against splitting a cause of action. Second, splitting of the one parcel into 11 separate parcels reflects more nearly the various geographical differences and historical origins of the parcels involved. Rather than harassing the defendant, such splitting would make it

easier for the factual differences between the parties to be settled.

While *Coos Bay Oyster Coop. v. Highway Com.*, supra, cited by defendant, does support the proposition that interests in land cannot be split into fractional claims, that case involved the attempt to split one interest in real property into several subinterests; this was not the result here. Also, *Coos Bay* must be evaluated in light of the policy determinants behind the prohibition of a splitting of the cause of action. Viewed in this light, we do not find the splitting of the land in question into 11 separate parcels, each the subject of a cause of action, to be improper.

VIII. Prescriptive Rights

The defendant alleges that the company had, continuously since 1920, conducted sand and gravel removal operations from the disputed portions of the Willamette River, which removal had been open, continuous, notorious, hostile, exclusive and adverse to the state, and had been known to the state since 1933. The defendant contends that this removal results in the defendant's acquiring an irrevocable property right to remove sand and gravel from the disputed property. The defendant contends that this property right is one of prescription.

There is some authority that a state may lose rights to property through prescription. As noted in 1 Farnham, Waters and Water Rights 225, § 45b:

> "Where the land under tide water may be granted by the state, no reason exists why a private individual cannot establish title under the theory of lost grant. • • • [R]ecords may become lost,

> and it is unreasonable to require the original grant to be produced in all cases. Therefore the presumption of grant may be raised by long possession accompanied by acts of ownership • • •."

However, it is important to note that this prescriptive right is limited:

> "• • • If the law prohibits the grant of the tide land, no title can be acquired by adverse possession, since no grant can be presumed • • •." 1 Farnham, supra at 226.

Between 1878 and 1963, there was no statutory provision by which the state could grant title to any nontidal portion of the Willamette River. *See, State v. McVey,* supra; *Corvallis Sand & Gravel v. Land Board,* supra. The authority of the state to grant title to submerged and submersible lands in the Willamette River in the Corvallis area arose after 1963. Since the state has been actively contesting defendant's possession of these parcels since 1958, it is impossible for defendant to contend that there has been a "lost grant" prior to 1963. No prescriptive rights arose against the state.

IX.

Defendant raises several assignments of error which need only brief mention. First, it contends that ejectment will not lie to recover the possession of land under water. This question has, by implication, been decided adversely to defendant's claim in *Corvallis Sand & Gravel v. Land Board,* supra. *See also, Lowndes v. Huntington,* 153 US 1, 14 S Ct 758, 38 L Ed 615 (1894); *Bates v. Illinois Central Railroad Company,* 66 US (1 Black) 204, 17 L Ed 158 (1861).

Defendant's argument that estoppel and acquiescence in the trespass should apply against the state in

this case was also decided adversely to defendant's position in *Corvallis Sand & Gravel Co. v. Land Board,* supra, 250 Or at 328-29. The same policy considerations that militated against the allowance of the defense of laches in that case apply alike to the defense of estoppel and acquiescence.

Defendant's argument that the statute of limitations applies is without support. ORS 12.250.[6]

Finally, defendant raises certain constitutional challenges to both the ejectment statutes, ORS 105.005, et seq, and the ejectment proceeding as a whole. Both of these points could have been raised in the earlier challenge to the proceeding in *Corvallis Sand & Gravel Co. v. Land Board,* supra, but were not. Even assuming that these arguments are meritorious, defendant is foreclosed from raising them now.

In sum, we affirm the judgment of the trial court in all respects with the exception of the award of damages for Parcel 3, which award we reverse.

Affirmed in part; reversed in part.

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[6] "Unless otherwise made applicable thereto, the limitations prescribed in this chapter shall not apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit." ORS 12.250.

APPENDIX G

MEMORANDUM OPINION OF BENTON COUNTY CIRCUIT COURT

No. 21512—May 25, 1972

IN THE CIRCUIT COURT

OF THE STATE OF OREGON

FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff, vs. CORVALLIS SAND AND GRAVEL COMPANY, an Oregon Corporation, Defendant.	)	No. 21512 MEMORANDUM OPINION

This action was tried before the Court without jury on October 11, 1972. Leave was given each party to file proposed findings and written argument in lieu of closing arguments. The Court has considered the written materials submitted by the respective parties and has reviewed the evidence, and briefs submitted. The Court now finds as follows:

1. Defendant's Motion heard and argued on May 12, 1972, asking the Court to reconsider its previous rulings on pleadings is denied.

2. The State of Oregon acquired title to all lands within its borders lying between the ordinary high water mark and the ordinary low water mark of all navigable streams when it was admitted to the Union. Private ownership of the lands lying between the

high and low water marks oi the Willamette River, must therefore be by grant from the State of Oregon. This acquisition of title by the State was by virtue of the State's soverignity [sic]. These lands cannot be sold, or otherwise disposed of, by the State so as to prevent their use by the public of the navigable waters for navigation and fishing. *Corvallis Sand and Gravel Company vs. Land Board* 250 Or 319, 333.

The ownership if any of the Defendant in these lands must therefore be traced to a conveyance, or its equivalent, from the State of Oregon. Ownership in the State is presumed to continue until the State is shown to have parted with its title. *State v. McVey,* 168 Or 337 345.

The Defendant did not acquire title by adverse possession or laches against the State. *Corvallis Sand and Gravel vs. Land Board,* supra. The evidence does not establish title to the lands by conveyance from the State.

The Defendant claims title to some of the lands under the Laws of 1874, p. 76, Sec. 1, which provided that title of the State to tide and overflow lands upon the Willamette River was granted to the owners of the adjacent lands. The act was repealed effective October 18, 1878. "Owners" as used in this statute refers to the grantees of the United States and their successors in interest. The 1874 statute did not grant or confirm title in the United States government to any parts of the beds of navigable waters in the State. *State v. McVey* Supra, 356.

Defendant's predecessor in title, entered upon Gov-

ernment Lots 9, 10 and 12 of Sec. 12, T12S, R5W, on March 12, 1875. He was entitled to a patent on July 8, 1880. The patent was received April 10, 1882. Defendant's predecessor in interest did not become an "owner" within the meaning of the 1874 statute before its repeal in 1878, nor did his patent convey to him any parts of the bed of the Willamette River.

Parcel 1

Defendant makes no claim to that portion of Parcel 1 which is located from the line described in "number one" on page 11 of Defendant's third amended answer. The line starts at the approximate southwest corner of Lot 10.

Prior to removal by dredging of large quantities of rock and gravel by a railroad in 1913, a large portion of what is described as Parcel 1 consisted of a formation known as Avery Bar. The Defendant alleges that Avery Bar was a point bar accretion to lands of which he is the grantee, to-wit, government Lots 10 and 11. The Court finds that this portion of the bed of the Willamette River is not a part of the Fischer Cut hereinafter to be discussed. The Court further finds that although Avery Bar originated as an island, it subsequently, but prior to 1913 by accretion became a point bar joined to the uplands. The Court finds that the accretion first joined the uplands at the ordinary low water mark, and that

the point bar then developed on top of the joinder. The State owned from the ordinary high water mark to the ordinary low water mark. The point bar, known as Avery's Bar accreted to land owned by the State. Parcel 1 therefore belongs to the Plaintiff.

Parcel 2 A, B, and C

The Court finds that the Willamette River was clearly coursing around Fischer Island, a peninsula-like formation, from 1853 to 1909. By 1890 a clearly discernible overflow channel over the neck of the peninsula had developed.

After a record flood on November 25, 1909, the Willamette River visibly changed its course from around Fischer Island to across its neck through Fischer Cut. In 1906 prior to the "break through" it was estimated that roughly one quarter of the flow of the river was carried through Fischer Cut which was dry at low water, or below the 5 foot stage, and carried only at intermediate or high stages of the river. In 1890, Fischer Cut would have had to be cleared of driftwood and willow growth before it could possibly accommodate the flow of the river. The Fischer Cut channel in 1906 was in practically the same location as it was in 1890.

During the period intervening 1890-1909 the high water overflow did not clear Fischer Cut and the river continued to flow around Fischers Island. The event

when the Willamette River broke through Fischer Cut during the flood of November 25, 1909, was an event of common community discussion and the complete change of course shortly after its occurrence was observed by creditable witnesses including retired Circuit Judge Fred McHenry. The final action of the river was sudden and of such great force and violence as to convert Fischer Cut into the main channel of the Willamette River.

The change in course was not gradual and imperceptible as would occur in accretion or reliction. This was a sudden, rapid, and violent change of course, avulsive in character. The Court finds that the change of the course of the Willamette River from around Fischer's Island to through Fischer's Cut was an avulsive change, and that Parcels 2A, 2B, and 2C are owned by defendant.

Parcel 3

The Court finds that the portion of Parcel 3 downstream from the confluence of East River (prior to 1909, the Willamette River), which courses in part around Fischer Island, as measured by a line extended from the low water mark of the confluence extended across the Willamette River, lies within the bed of the Willamette River, and that the River has coursed over this portion in substantially the same manner since 1853. The Court finds that this portion of Parcel 3 is owned by Plaintiff. Parcel 3 is a part of Lots 11 and 12, Section 1, which was

the subject of a patent prior to 1878. Defendant's predecessor in title under the 1874 Act was owner to the low water mark of the Willamette River as it coursed around Fischer's Island. That part of the Willamette River changed course in 1909 to Fischer's Cut, and the former bed of the Willamette River in now named East River. Defendant therefore is owner of that portion of Fischer Cut upstream from the confluence of East River below, or upstream, as measured by a line extended from the low water mark of the confluence extended across the Willamette River. The remainder of Parcel 3 is owned by the Plaintiff.

Parcel 4

The Court finds that a substantial part of Parcel 4 now under water was in the bed of the river below the low water marks prior to the construction of a wingdike in 1948. This accreted formation, whether it be an island or point bar joined to the upland, was formed upon the bed, or accreted and joined the upland beginning at the low water mark. In either event it became a part of the land owned by Plaintiff, that is, the bed of the river between high and low water marks. Thus it is not material to ownership whether the accreted mass became covered with water from whatsoever cause be it the wingdike or the dredging of Avery Bar by the railroad in 1913-14.

Parcel 5

The Court finds that Parcel 5 is in the bed of the River between the lines of high and low water and that the Defendant's predecessors in title acquired no right therein by the Act of 1874. Parcel 5 is owned by Plaintiff, to the extent that it lies below the high water mark.

Parcels 6 and 7

The Defendant's predecessors in title of Parcels 6 and 7 acquired no right therein by the Act of 1874. Further the Court finds that Parcels 6 and 7 are not within the avulsive channel of Fischer Cut. The ownership of Parcels 6 and 7, including Avery Bar, or the railroad bar, within the lines of high and low water is in the Plaintiff.

Parcel 8

The Court finds Parcel 8 to be a point bar, joined to the uplands above the low water mark, and that the uplands were patented during the effective period of the 1874 statute. The Court finds Defendant to be the owner of Parcel 8.

Parcel 9

Defendant makes no claim to Parcel 9.

HIGH AND LOW WATER MARK

The Court finds that the ordinary low water mark at the guage at the City of Corvallis Water Treatment Plant is 197.4 feet above mean sea level, and from this point downstream, the ordinary low water mark drops an average of .9 feet every one-quarter of a mile.

The Court finds that the ordinary high water mark beginning at the location of the guage of the Corvallis Water Treatment Plant is 207.4 feet above mean sea level and from this point downstream, the ordinary high water mark drops an average of .9 feet every one-quarter of a mile.

DAMAGES

The Court finds as follows:

1. Plaintiff is entitled to recover damages for the period of six years immediately preceding the filing of the original complaint herein, and to date.

2. The Defendant is not entitled to an offset for "avoidable consequences" or for failure to mitigate damages.

3. Plaintiff is entitled to damages at 12.5 cents per cubic yard of minerals removed, which the Court finds would have been a reasonable sum to be paid as royalty during the entire period of wrongful withholding.

4. Plaintiff is entitled to damages upon the total amount of minerals taken within the low-high water boundaries as established by this Court.

The Court finds as follows:

1. 574,000 cubic yards of minerals were removed from Parcel 1; 56,000 from Parcel 3, in addition to that covered by the lease; no material from Parcel 4; 9,000 from Parcel 5; 21,000 from Parcel 6; none from Parcel 7, for a grand total of 660,000 cubic yards.

2. That the Plaintiff is entitled to recover damages of a total of $82,500.

3. The Court finds that the damages are unliqui-

dated and that Plaintiff is entitled to interest only from date of judgment.

Plaintiff may submit findings of facts and conclusions of law accordingly.

Dated this 25th day of May, 1972.

RICHARD MENGLER
Circuit Judge

APPENDIX H

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND SUPPLEMENT TO COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN THE CIRCUIT COURT

OF THE STATE OF OREGON

FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff, v. CORVALLIS SAND AND GRAVEL COMPANY, an Oregon Corporation, Defendant.	)	No. 21512 FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

A. **Finding of Fact**

The Willamette River was a navigable river at the time of Oregon's admission into the Union in 1859, and is now navigable, in that section of the river between its confluence with the Mary's River and upstream to the present site of the City of Corvallis Water Treatment Plant.

B. **Conclusions of Law**

The State of Oregon acquired title to all lands with-

in its borders lying between the ordinary high water mark and the ordinary low water mark of all navigable streams when it was admitted to the Union. This acquisition of title by the State was by virtue of the State's sovereignty. Private ownership of the lands lying between the high and low water marks of the Willamette River, must therefore be by grant from the State of Oregon. These lands cannot be sold or otherwise disposed of by the State so as to prevent their use by the public of the navigable waters for navigation and fishing.

The ownership, if any, of the Defendant in these lands must therefore be traced to a conveyance, or its equivalent, from the State of Oregon. Ownership in the State is presumed to continue until the State is shown to have parted with its title.

II.

A. **Finding of Fact**

Defendant did not acquire title to any of the property in dispute by a conveyance from the State of Oregon.

B. **Conclusion of Law**

The defendant could not acquire title as against the State of Oregon to any of the property in dispute by adverse possession or laches.

III.

A. **Finding of Fact**

Defendant's predecessor in title entered upon Government Lots 9, 10 and 12 of Sec. 12, T12S, R5W, on March 12, 1875. He became entitled to a patent from the United States on July 8, 1880. The patent was received April 10, 1882.

B. **Conclusion of Law**

Defendant's predecessor in interest did not become an "owner" of Government Lots 9, 10 and 12 within the meaning of laws 1874, p. 76, prior to the repeal of such law on October 18, 1878, by laws 1878, pp. 54-55, nor did his patent convey to him any part of the bed of the Willamette River.

IV.

A. **Finding of Fact**

1. Ordinary Low Water Mark

(a) The elevation of ordinary low water mark is 197.4 feet above mean sea level at the City of Corvallis Water Treatment Plant.

(b) From this point downstream, the ordinary low water mark drops an average of 0.9 feet every one-quarter of a mile.

2. Ordinary High Water Mark

(a) The elevation of the ordinary high water mark is 207.4 feet above mean sea level at the City of Corvallis Water Treatment Plant.

(b) From this point downstream, the ordinary high water mark drops an average of 0.9 feet every one-quarter of a mile.

V.

Parcel 1

A. **Findings of Fact**

1. Parcel 1 lies between the present lines of ordinary low water with its upstream limits delineated by a line at right angles to the river and opposite the City of Corvallis Water Treatment Plant and its downstream limits coinciding with the upstream limits of Parcel 2A.

2. Defendant disclaims any interest in that portion of Parcel 1 upstream of a line commencing at the approximate southwest corner of Lot 10.

3. Prior to 1913, a large portion of Parcel 1 consisted of a formation known as Avery Bar.

4. That portion of the bed of the Willamette River occupied by Avery Bar was not a part of Fischer Cut, discussed under Parcels 2A, 2B and 2C.

5. Prior to 1913, Avery Bar originated as an island on the bed of the river below the lines of ordinary low water.

6. Subsequently and by accretion, prior to 1913, the island joined the uplands on the left bank at the ordinary low water mark in front of government lots 9 and 10.

7. Thereafter, a point bar developed on top of the joinder.

8. Thereafter, the railroad in 1913 removed most

of the bar by dredging large quantities of rock and gravel.

9. The state owned from ordinary high water mark to ordinary low water mark in front of government lots 9 and 10.

10. The point bar, known as Avery Bar, accreted to land owned by the state, that is, to the island which had originated in the bed of the river below ordinary low water.

11. Therefore, it is not material whether the accreted mass became covered with water from whatsoever cause, be it the wingdike constructed by the Corps of Engineers in 1948, discussed under Parcel 4, or the dredging of Avery Bar by the railroad in 1913-1914.

B. **Conclusion of Law**

Plaintiff owns Parcel 1.

VI.

Parcels 2A, 2B, and 2C

A. **Findings of Fact**

1. Fischer Island from 1853 to 1909 was a peninsula-like formation around which the Willamette River coursed.

2. By 1890 a clearly discernible overflow channel over the neck of the peninsula had developed known as Fischer Cut.

3. In 1890 Fischer Cut would have had to be cleared of driftwood and willow growth before it could possibly accommodate the flow of the river. The Fischer

Cut Channel was dry at low water, or below the five-foot stage, and carried water only at intermediate or high stages of the river.

4. In January of 1906 the Fischer Cut Channel was in practically the same location as it was in 1890. It was estimated then that roughly one-quarter of the flow of the river was carried through Fischer Cut.

5. Between 1890 and 1909 the high water overflow through Fischer Cut did not sufficiently clear Fischer Cut to allow for the full flow of the river and the river continued to flow around Fischer's Island during that period.

6. As the result of a flood of November 25, 1909, the river suddenly and with great force and violence converted Fischer Cut into the main channel of the river.

7. The change was not gradual and imperceptible but was a rapid and violent change of course, avulsive in character and constituted an avulsion.

8. Parcels 2A, 2B and 2C combined are included in the area known as Fischer Cut.

B. **Conclusion of Law**

Defendant owns Parcel 2A, 2B and 2C.

VII.

Parcel 3

A. **Findings of Fact**

1. Portion of Parcel 3 below confluence of East River.

(a) Parcel 3 lies in the bed of the river between ordinary low water marks.

(b) The portion of Parcel 3 downstream from a line extended from the low water mark of the left bank of East River (prior to 1909, the Willamette River) extended across the Willamette River, lies within the bed of the River over which the river has coursed in substantially the same manner since 1853.

2. Portion of Parcel 3 upstream of confluence of East River.

(a) This portion of Parcel 3 is a part of government lots 11 and 12, Section 1, which lots were patented prior to 1878.

(b) Defendant's predecessor in title under the laws of 1874, p. 76, owned to the low water mark of the Willamette River as it coursed around Fischer's Island.

(c) That part of the Willamette River changed course in 1909 to Fischer's Cut, and the former bed of the Willamette River is now named East River.

B. **Conclusion of Law**

1. Plaintiff is the owner of that portion of Parcel 3 below the confluence of East River as delineated by a line extended from the low water mark of the left bank of East River (prior to 1909, the Willamette River) across the Willamette River.

2. Defendant is the owner of that portion of Parcel 3 upstream from the line extended from the low water mark of the left bank of East River across the Willamette River.

VIII.

Parcel 4

A. **Findings of Fact**

1. Parcel 4 is an accreted formation lying on the right bank of the Willamette River just downstream from the City of Corvallis Water intake structure. The riverward boundary of this parcel is the ordinary low water line as defined by the court. The landward boundary line is the ordinary low water line as it existed around a portion of this parcel in July of 1969 and extended around the remainder.

2. A substantial part of Parcel 4 was in the bed of the river below low water marks prior to the construction of a wingdike by the Army Corps of Engineers in 1948.

3. This accreted formation originated in the river bed as either an island or a point bar, below the lines of ordinary low water.

4. This accreted formation rose from the bed and joined the upland at low water marks along the right bank.

5. The accretion was the direct result of the construction by the Corps of Engineers of a wingdike in 1948 which was placed on the island or point bar prior to its joinder to the upland.

6. Since the accretion originated from the state

owned bed below the lines of ordinary low water, it belonged to the state.

B. **Conclusion of Law**

Plaintiff owns Parcel 4.

IX.

Parcel 5

A. **Findings of Fact**

1. Parcel 5 lies in the bed of the river between the lines of ordinary high and ordinary low along the left bank of the river.

2. Inasmuch as Parcel 5 fronts government lots 9 and 10, defendant's predecessors in title acquired no right therein under laws of 1874, page 76.

B. **Conclusion of Law**

Plaintiff owns that portion of Parcel 5 which lies below the ordinary high water mark.

X.

Parcel 6

A. **Findings of Fact**

1. Parcel 6 lies in the bed of the river between the lines of ordinary high and ordinary low water along the left bank of the river.

2. Parcel 6 is not within the avulsive channel of Fischer Cut.

3. Defendant's predecessor in title acquired no right therein by virtue of Laws of 1874, p. 76.

B. **Conclusion of Law**

Parcel 6, including any portion thereof which may consist of portions of the Avery Bar, and within the lines of high and low water, is in the plaintiff.

XI.

Parcel 7

A. **Findings of Fact**

1. Parcel 7 lies in the bed of the river between the lines of ordinary high and ordinary low water along the left bank of the river.

2. Parcel 7 is not within the avulsive channel of Fischer Cut.

3. A portion of Parcel 7 occupies submersible lands in front of government lot 12 of section 12. The remaining portion of Parcel 7 was not riparian prior to the repeal of laws of 1874, page 76, by laws of 1878, pages 54-55.

4. Therefore, defendant's predecessors in title acquired no right therein by virtue of the laws of 1874, p. 76.

B. **Conclusion of Law**

Parcel 7, including any portion thereof which may consist of portions of the Avery Bar, and within the lines of high and low water, is in the plaintiff.

Parcel 8

A. **Findings of Fact**

1. Parcel 8 was a point bar, joined to the uplands above the low water mark.

2. The uplands were patented during the effective period of laws, 1874, p. 76.

B. **Conclusion of Law**

Parcel 8 belongs to the defendant.

Parcel 9

A. **Findings of Fact**

1. Defendant disclaims any interest in Parcel 9.

2. Parcel 9 presently lies within the bed of the river between the lines of ordinary high and low water marks as determined by the court.

B. **Conclusion of Law**

Plaintiff, as against the defendant, owns Parcel 9.

XII.

Damages

A. **Findings of Fact**

1. Plaintiff is entitled to recover damages for the period of six years immediately preceeding the filing of the original complaint herein until to date, namely, from June 7, 1959, to date.

2. Defendant is not entitled to an offset for "avoidable consequences" or for failure to mitigate damages.

3. Plaintiff is entitled to damages at 12.5 cents per cubic yard of minerals removed, which the Court finds would have been a reasonable sum to be paid as royalty during the entire period of wrongful withholding.

4. Plaintiff is entitled to damages upon the total

amount of minerals taken within the low-high water boundaries established by this Court.

5. With respect to materials that were removed, the Court finds as follows:

(a) 574,000 cubic yards of minerals were removed from Parcel 1.

(b) 56,000 cubic yards of minerals were removed from Parcel 3. The materials so removed were not subject to the lease between the parties and were in addition to the materials removed by the defendant from Parcel 3, which were subject to the terms of the lease between the defendant and the plaintiff.

(c) No material was removed from Parcel 4.

(d) 9,000 cubic yards of minerals were removed from Parcel 5.

(e) 21,000 cubic yards of minerals were removed from Parcel 6.

(f) No minerals were removed from Parcel 7.

(g) The total amount of minerals removed from plaintiff's property was 660,000 cubic yards.

B. **Conclusions of Law**

1. Plaintiff is entitled to recover damages in the amount of $82,500 from the defendant.

2. The damages are unliquidated and plaintiff is entitled to interest only from the date of Judgment.

Dated this 19th day of June, 1972.

/s/ RICHARD MENGLER
Circuit Judge

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff, vs. CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation, Defendant.	)	No. 21512 Supplement to Court's Findings of Fact and Conclusions of Law

WHEREAS, on June 19, 1972, the Court entered its Findings of Fact and Conclusions of Law; and

WHEREAS, the parties filed objection thereto and requested other and different findings; and

WHEREAS, the plaintiff was to submit detailed property descriptions as part of the Court's findings by way of Supplement thereto,

NOW, THEREFORE, the Court does hereby enter its Supplement to its Findings of Fact as follows:

1. Findings of Fact IV A. 2.(a), Page 3, Line 7 is amended to read, "207.7".

2. Findings of Fact VI A. 3., Page 4, Line 27, is amended by deleting, "possibly".

3. Findings of Fact X, Page 8, is amended by adding the following additional finding after Line 10, Page 8:

> "4. Parcel 6 formed in the bed of the river after 1878 and accreted to the uplands at the low water mark on the frontage of government lots 10, 11 and 12 of Section 12. The accreted formation cut off the submersible lands fronting what remained of Government Lot 11."

4. A legal description of each of the parcels involved in this litigation, as amended by the Court's Findings of Fact and Conclusions of Law and the within Supplement thereto, is annexed hereto as Exhibits A through K and made a part hereof by reference.

Dated this 28th day of July, 1972.

/s/ RICHARD MENGLER
Circuit Judge

APPENDIX I

COPY OF JUDGMENT OF
BENTON COUNTY CIRCUIT COURT
No. 21512
(Parcel Legal Descriptions omitted)

IN THE CIRCUIT COURT

OF THE STATE OF OREGON

FOR THE COUNTY OF BENTON

STATE OF OREGON, Acting by and through the State Land Board, Plaintiff,	)	No. 21512
vs.	)	
CORVALLIS SAND AND GRAVEL COMPANY, an Oregon Corporation, Defendant.	)	JUDGMENT

The above entitled matter having come on regularly for trial before the Court without a jury; plaintiff appearing through its attorneys Lee Johnson, Attorney General; by Peter S. Herman, Senior Counsel; and Philip J. Engelgau, Assistant Attorney General; defendant appearing through its president, John H. Gallagher, and through its attorneys, Robert Mix and George Mead; and the Court having considered the evidence of the parties and the arguments of counsel and having heretofore denied defendant's motion to reconsider the Court's previous rulings on the pleadings, and the Court having entered its Findings of Fact and Conclusions of Law and its Supplement thereto;

NOW, THEREFORE, the Court does hereby order and adjudge as follows:

I.

Defendant's motion asking the Court to reconsider its previous rulings on the pleadings is denied.

II.

Parcel 1

Plaintiff is the owner in fee simple of Parcel 1, and is entitled to the immediate possession thereof; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 1 is annexed hereto as Exhibit A and made a part hereof.

It is FURTHER ORDERED that plaintiff do have and recover from the defendant the sum of Seventy-One Thousand Seven Hundred Fifty Dollars ($71,750.00) as damages for the wrongful withholding of possession of Parcel 1 by the defendant from July 1, 1959, to the date of this Judgment.

III.

Parcels 2A, 2B and 2C

Defendant is the owner in fee simple and entitled to the possession of Parcels 2A, 2B and 2C. A legal description of Parcels 2A, 2B and 2C is annexed hereto as Exhibits B, C and D, respectively, and made a part hereof.

IV.

Parcel 3

Plaintiff is the owner in fee simple of Parcel 3 and was entitled to the immediate possession of said parcel prior to July 1, 1963, the beginning date of the ten year lease between the parties covering said parcel. A legal description of said parcel is annexed hereto as Exhibit E and made a part hereof.

It is THEREFORE ORDERED that Plaintiff do have and recover from the defendant the sum of Seven Thousand Dollars ($7,000.00) as damages for the wrongful withholding of possession of said parcel by the defendant on and between July 1, 1959, and July 1, 1963.

V.

Parcel 4

Plaintiff is the owner in fee simple of Parcel 4 and is entitled to the immediate possession of said parcel; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 4 is annexed hereto as Exhibit F and made a part hereof.

VI.

Parcel 5

Plaintiff is the owner in fee simple of Parcel 5 and entitled to the immediate possession of Parcel 5; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 5 is annexed hereto as Exhibit G and made a part hereof.

It is FURTHER ORDERED that plaintiff do have and recover from the defendant, the sum of One Thousand One Hundred Twenty-Five Dollars ($1,125.00) for the wrongful withholding of possession of said parcel by the defendant from July 1, 1959, to the date of this Judgment.

VII.

Parcel 6

Plaintiff is the owner in fee simple of Parcel 6 and is entitled to the immediate possession of Parcel 6; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 6 is annexed hereto as Exhibit H and made a part hereof.

It is FURTHER ORDERED that plaintiff do have and recover from the defendant the sum of Two Thousand Six Hundred Twenty-Five Dollars ($2,625.00) for the wrongful withholding of possession of said parcel by the defendant from July 1, 1959, to the date of this Judgment.

VIII.

Parcel 7

Plaintiff is the owner in fee simple of Parcel 7 and is entitled to the immediate possession of Parcel 7; it is

THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. A legal description of Parcel 7 is annexed hereto as Exhibit I and made a part hereof.

IX.

Parcel 8

Defendant is the owner in fee simple and entitled to the possession of Parcel 8. A legal description of Parcel 8 is annexed hereto as Exhibit J and made a part hereof.

X.

Parcel 9

Plaintiff is the owner in fee simple of Parcel 9 and is entitled to the immediate possession of Parcel 9; it is THEREFORE ORDERED that plaintiff have the immediate possession thereof from the defendant. Defendant disclaims any interest in said parcel. A legal description of said parcel is annexed hereto as Exhibit K and made a part hereof.

Based on the above items of damages awarded plaintiff, it is ORDERED AND ADJUDGED that plaintiff do have and recover from the defendant the grand total of Eighty-Two Thousand Five Hundred Dollars ($82,500.00) and its costs and disbursements herein incurred which are taxed in the sum of $371.50.

Dated this 28th day of July, 1972.

/s/ RICHARD MENGLER
Circuit Judge

APPENDIX J

COPY OF EXH 110-A, U.S. CORPS OF ENGINEERS LETTER OF JANUARY 10, 1906

U.W&Y.

UNITED STATES ENGINEER OFFICE

321 Custom House

P.O. Drawer 50 Portland, Oregon

January 10, 1906.

Major S. W. Roessler,
Corps of Engineers, U. S. Army,
Portland, Oregon.

Major:

In accordance with your instructions, on January 4th, I made examination of the Willamette River in the vicinity of Corvallis and found a substantial fraction of the river flowing through the high water "cut off" channel above the City as reported in Mr. August W. Fisher's recent letters to this office. It is roughly estimated that about one quarter of the flow of the river is carried by this channel.

The channel in question is across the neck of a peninsula and is some 3,200 feet long, while the distance around by the main river is two and one quarter miles.

This channel has existed for a number of years as maps on file in this office show it in practically the same location in 1890, though the mouth of the channel was then closed by a gravel bar. The fall from its head to

its foot is noted as about 8 feet. The approximate present location of the channel is shown in dotted lines on the sketch herewith.

The river was at a 4 foot stage at the time of my examination and the banks along this new channel showed indication of recent caving, particularly towards its lower end. The land at the foot of the channel and along the west bank of the Willamette to the mouth of Mary's River is owned by the Corvallis Flouring Mills, and Mr. Fisher, who is the executor and Manager of these mills is naturally apprehensive of injury to his property as well as to navigation and is therefore desirous that the United States make an effort to prevent the development of this new channel.

It is a question whether this channel will increase greatly during high water and even should it do so, whether any actual injury to navigation would result, for the reason that boats use the river above Corvallis very little and then only during high stages, at which time there would be ample depth in the river notwithstanding the "cut off".

It is estimated that a closing dam at the head of this "cut off" of piles, brush and stone, with necessary shore protection at each end, would have to be from 800 to 1,000 feet in length and would cost several thousand dollars if constructed under favorable low water

conditions, and as the interests of navigation do not at present seem imperilled the expenditure seems not justifiable.

This was explained to Mr. Fisher, who visited the "cut off" with me, and he was asked to keep this office informed of any change in the conditions and he was given permission to keep the cut free from lodging trees at its lower end for the purpose of preventing further scour of his land,—and this seemed satisfactory to him.

It is recommended that a further examination of the "cut off" be made at the close of the high water season next spring.

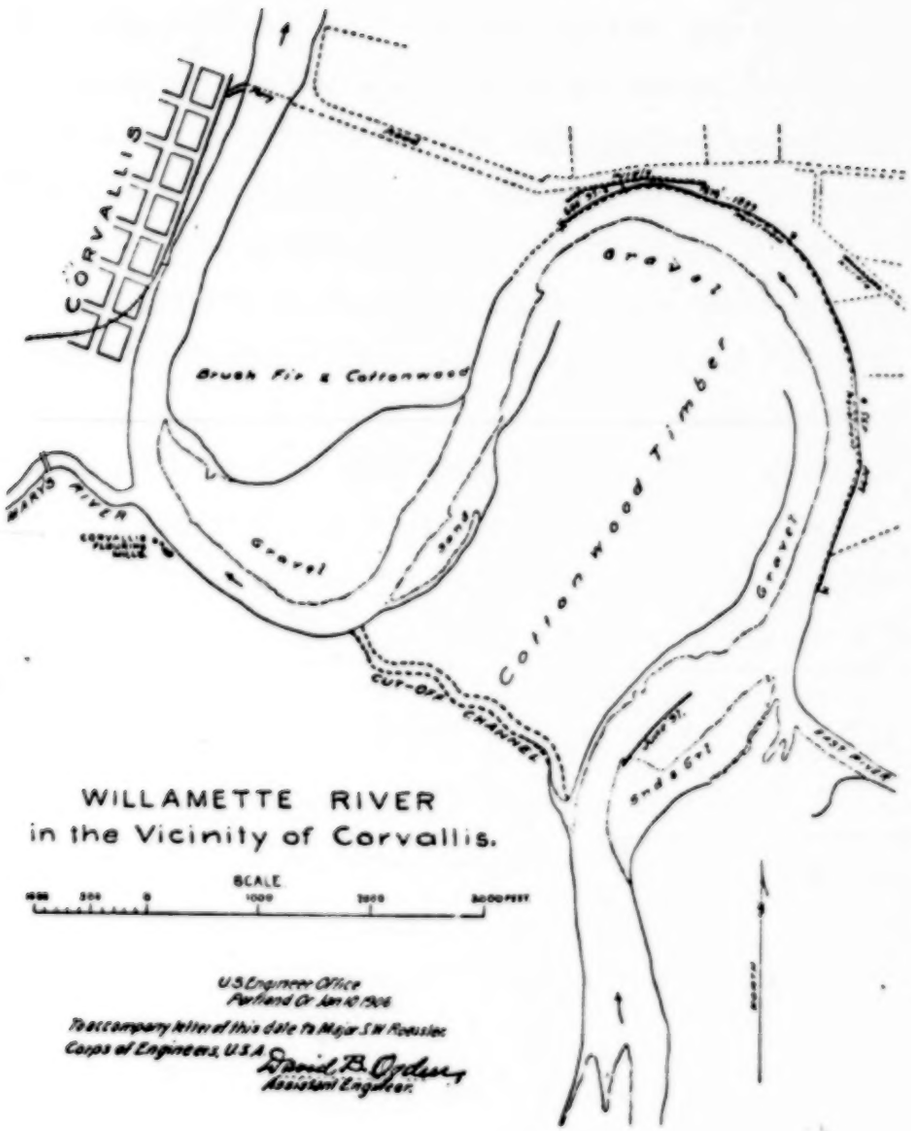
While at Corvallis I also made examination of the mile or more of revetment above the City formerly constructed by the United States and found it to be in good condition.

Very respectfully,

DAVID B. OGDEN

Asst. Engineer.

1 Inclosure.



APPENDIX K

TESTIMONY OF FRED S. FISCHER

(Transcript pp 389 to 405)

FRED S. FISCHER, being called as a witness, was first duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Herman:

Q Can you hear me all right, Mr. Fischer?
A Yes, I'm all right.
Q Would you state your full name for the record, please?
A Huh?
Q Would you state your full name for the record?
A Huh?
Q State your name.
A Oh, Fred S. Fischer.
Q And you reside here in Corvallis?
A Born here, yes.
Q When were you born, Mr. Fischer?
A December 29, 1881.
Q And you have lived here all your life?
A Yes, practically all my—a little time I was at college away from town, but this is my home. I was in Portland for probably six or seven months, went to business college there.

Q Mr. Fischer, I'm going to have you handed Exhibit 15 which is an aerial photograph.

A Yes, this is Seavy hop yard and this is the Crystal Lake.

Q That's correct.

A And cemetery is here and hop dryers are here, that's right, and the gravel bunkers is at the mouth of this cut and our flour mill was right here.

Q You are pointing where the arrow is and right next to the word "mill," that was the Fischer flour mill?

A Yes, that was the Fischer flour mill and Marys River come in there, doesn't it?

Q That's correct.

A And our home was right—right about there, that's where I was born.

Q Right near to the mill?

A Yes, just—

Q Do you recognize this over there across the river?

A Oh, yes, yes.

Q Fischer Island?

A Fischer Island, yes. That should be a "C" in there but then it's S-C-H, it's German.

Q All right. Now, Mr. Fischer, did you used to play in the area of Fischer Island when you were a boy?

A Yes, yeah, all the young fellows, oh, around 12, 13, 14 years, we used to hunt in there for rabbits.

Q I see.

A And my brother used to shoot China pheasants over there too because I was too young to use a gun at that time.

Q All right. Did the river used to go around Fischer Island?

A No.

Q How did the river used to go?

A Well, now let's see. This is the new channel, huh?

Q Yes.

A And this is—what is this here?

Q I think that is the old East River.

A East River, and what—you want to know now is where it broke through?

Q That's right, I am interested in this gully I think you described in your deposition.

A Uh-huh.

Q Some weeks ago.

A Yes. And this here is about, oh, I would judge two and a half to three miles around there.

Q You are talking about Fischer Island?

A Yes, and this here cut here is probably three-quarters of a mile, half to three-quarters of a mile.

Q Is that what you call Fischer Cut?

A Yes, I call that the Fischer Cut and then that draw was right in through here.

Q Do we have—

A It was—

Q —a crayon, Mr. McReary? Do you want to mark where the draw was, Mr. Fischer?

A Well, if I can locate myself now, this is—what is that?

Q Well, that is an island in 1932—or 1936, Mr. Fischer.

A Oh.

Q That is upstream from Fischer Island, of course.

A Yeah, well now, let's see. Was this Marys River—no.

Q No, that's where the East River meets the Willamette River, the Marys River is down here.

A Oh, I see. This is the East River?

Q That's correct.

A East River, and you want to know—

Q The approximate location of this cut or gully.

A It would be right in through there.

Q Do you want to make a series of crosses?

A Well, now let's see if I understand it right. What does this white represent?

Q Well, I think that's gravel.

A Gravel.

Q Or silt, Mr. Fischer.
A Uh-huh.
Q Remember, this is a 1936 photograph.
A Uh-huh. Well, it would be right in through there, it extended and this area is what?
Q Well, that is just part, that is just upstream, Mr. Fischer.
A Uh-huh. Well, this is all dry land now, isn't it?
Q Yes.
A Yeah. Well, let's see now, and you want to know where—
Q Well, let's stop there a minute, Mr. Fischer. You have marked three crosses, did you used to play in that area as a boy?
A Yes.
Q What was it, was it a gully?
A Yes, probably 25 feet wide and probably five or six—maybe, oh, seven—between six and eight feet deep.
Q I see.
A Just like that.
Q When would there be water in this gully?
A During the winter rainy season.
Q Would there be any water there in the summertime?
A In certain places where it washed out more, you see, that soil was just sandy soil and it washed down every high water.
Q There was sandy soil in the gully?
A Well, down—well, I'd say the hard pan was the bottom of it, but above that was sandy soil, it washed, the floods washed all the sandy soil out.
Q Was there a gully there as long as you can remember?
A Oh, yes, as I told you once before, the Lord Almighty made it.

Q So it was there when you were a boy?
A Oh, yes, yes.
Q How old do you think you were when you remember it there as a boy?
A Oh, probably eight-nine years old.
Q I see.
A Whenever Mother let me go.
Q I see. Now, you say there was water through that area in the wintertime?
A Oh, yes.
Q What about in the spring?
A The whole island sometimes was covered.
Q Was it overflowed?
A With the extreme high water.
Q I see. Did this gully enlarge during the years?
A Oh, yes it kept going in all the time now.
Q When you say it kept going in—
A Going, going east.
Q You mean moving toward Fischer Island?
A Yes, taking soil away from us.
Q I see.
A Probably as much as, oh, that area, I should judge we lost probably through that Fischer Cut probably 60 acres.
Q You mean the water eroded this away?
A Yeah, in time, oh, a period of five years anyway.
Q I see.
A Before it broke through and it kept gradually —gradually and finally the steamboat used to go around here.
Q Around Fischer Island?
A Yes. Now, the Hogue Creek, where is that, that is up in here, isn't it?
Q Maybe you can point it out, Bob.
MR. MIX: Yes, Mr. Fischer, this is where

Hogue Creek comes into the Willamette right here, sir.

A Yeah, yeah. Is Kiger Island over here?

Q This is Kiger Island and this is Booneville up in here.

A Yeah, we had a warehouse at Booneville years and years ago, that was about, oh, about '99, I should say, the Benton Mill, we bought the Benton Mill from the Avery and Gibson Company.

Q I see.

A There was competition between my father and them.

Q I see.

A So he finally bought the town mill, what I call the town mill, and put me in charge in there about 1903 and I was there until the highway bought the First Street property.

Q I see. Mr. Fischer—excuse me.

A Yes, all right.

Q Was there any water in this Fischer Cut during lower stages of the river?

A Very little, just in places where there was washed out a little more than ever.

Q I see.

A And let's see, they—the boys used to haul gravel, those fellows are all gone now, Lamerson and all that bunch with teams, you see, they hauled gravel and had to go through this cut or this draw and it was quite a pull when they had a yard of gravel or sand up this hill, and then there was another big hill right in here at the end of where Gallagher's land ends now.

Q I see. Was the upstream end of the gully higher than the downstream?

A Oh, certainly, certainly, it wouldn't flow if it didn't, yes, it was just a gradual—gradual grade through there, you see.

Q And it was a gradual process that the river eroded away this gully then finally broke through?

A Well, I think the gravel mostly come from up in here.

Q Gradual process, I said?

A Yes, that's right, and it filled in and filled in and finally we had—well, let's see, the gravel bunkers would be this way, wouldn't it. We have had what we call a dead-man over in here for the anchor for the cable that we drawed the gravel from here up into the bunkers.

Q You mean where East River meets the Willamette you hauled gravel across the river or dug it?

A No, this isn't East River, this is the river that comes around Fischer Island.

Q Fischer Island?

A Yeah, that's right, and that's the gravel, the dead-man would be just about—about there.

Q Why don't you put a "D" there, Mr. Fischer.

A All right. Our home would be about there where I was born.

MR. MIX: Yes, that's by the mill, wasn't it, Mr. Fischer?

WITNESS: Just this side of the mill.

MR. MIX: Yes.

WITNESS: In fact, we had a long storage place reach pert near to the house, but in years back it was, oh, that warehouse was probably a hundred feet long and two stories and we stored the flour and mill feed in there.

MR. MIX: I see.

WITNESS: An then they had doors at different places where the trucks could load or mostly wagons then.

Q Do you know when the river finally broke through, Mr. Fischer, and you mentioned to me yes-

terday that your brother sold the gravel bunkers and I think it was in —

A 1909.

Q 1909?

A Yeah, and Gallagher, you see, he started it in about 1909, then he sold to Gallagher in about '11.

Q I see. Had the river broken all the way through by then?

A By the time — oh, yes, that's the reason he built the bunkers because all that gravel from up in here.

Q From upstream?

A Yes, just kept—the winter floods would carry that gravel just like that. (Waving hands)

Q Carrying it into Fischer Cut?

A Through the Fischer Cut, yes.

Q I see.

MR. HERMAN: I think that's all, Your Honor on direct.

CROSS-EXAMINATION

By Mr. Mix:

Q Mr. Fischer, did your father own the land?

A Yeah.

Q Where the draw was?

A We bought that. There was a family by the name of Corthalver, they come from Illinois the same place that my father did. They come earlier and they bought this farm, let's see now, where would that be, you have the gravel bunkers—right in through here, they bought that, that was what we call the Corthalver place and my father bought that in about 19—, oh, in the '90's, I should say.

Q Now, after the river broke through it was flowing over land that had been your father's farm, is that correct?

A Oh, yes, it took about 60 acres through here.

Q Now, when you were a boy, did you used to run cattle in the summertime over to the island across the draw?

A My dad had a hundred cow dairy and we used that for pasture and I was a kid, I had a pony and it was my job to herd those cattle up to it, there was a gate right about there, right at the cemetery hill, and we took them up to the barn and had the boys milk them and we had a milk route here in town at one time also.

Q Uh-huh. Mr. Fischer, would you like to finish marking where the draw was before the river broke through, you started to make some X's?

A I want to know —

Q When it broke through?

A If I can get started here, what does this represent?

Q That is the river, Mr. Fischer, and this is a bar, a gravel bar in the river.

A And the river used to go through here?

Q Something like that, yes.

A Uh-huh.

Q About — excuse me.

A And then what you want to know is how long that gully was —

Q Yes, you said about —

A Well, right to the head of where it broke through, of course.

Q I see. I think that's fine.

A About there.

Q I see. I think that's fine.

A And about there, I imagine.

Q All right.

MR. HERMAN: You added two more crosses, Mr. Fischer, I'm just pointing that out.

WITNESS: Well, that's what I — and there was eventually there was a big pile of gravel right at the head of this, this old river.

MR. HERMAN: Yes.

WITNESS: That went around and all that gravel come from in here through the current, the winter floods. Can you think of anything else?

Q I'm just trying to think, Mr. Fischer, just give me a minute.

A All right. Take your time. Are you getting along all right? (Referring to court reporter)

Q Is it correct, Mr. Fischer, that after 1906 you ran the warehouse down on First Street?

A What, I didn't get that?

Q After 1906 did you run the warehouse down at First and Van Buren by the bridge?

A After, oh yes, before that.

Q And—

A I graduated up here at the college in '03 and then they put me down there, my brother August run the home plant and they bought this here, what we call the Benton Mill, that is the mill about a block this side of the Van Buren Street Bridge and they put me in charge there, and then I had another brother that we owned a mill in Silverton, Oregon and he was down there.

Q And where did you live while you were running the warehouse?

A Well, I was married in '15.

Q I see.

A And then I moved to where I live now, we built that house, I lived on Fifth Street for about a year and a half or two years while we were building the home that I live in at the present time which, as it's marked on the sidewalk, when we went in there in 1917, that is when the house — that is when the house was finished and we moved in there.

Q You didn't live out at the mill property after, say 1900 or so, is that correct?

A After 1900?

Q (Nodding head affirmably)

A Well, I lived there until I was married.

Q At the mill?

A At this house.

Q Oh, I see.

A At what we call Mother's home.

Q Just a moment.

MR. HERMAN: Does the reporter get that all right?

Q Was there a wagon road across over to the island?

A In early days, yes.

Q All right.

A Then as I told you, there was the cemetery that was quite a grade from the river bottom to the mainland and they had to pull that up and then through the draw, it was, as I said, it was about eight feet deep, six to eight feet deep, they had — it was quite a pull for those old horses with a yard of gravel to come up that.

Q You didn't see the actual breakthrough, did you?

A Oh no, no. I was in Illinois, I took my mother back to Illinois in, let's see, in '15. I had an uncle that was very sick and my mother's brother, and they called for her and she was getting pretty well along in age so they asked me if I would go and I was gone about, oh, five or six months and about that time this cut went through, this was about, oh, let's see now, let's see. I have it down here, about 19—, yeah, my brother started the bunkers in '09 and Gallagher bought it in '11 and I should say it took about five years for this break to come through from the main mouth of what would be called mouth of Hogue Creek.

Q I see. And that breakthrough, did I understand you to say it was around 1909 when your brother was operating the gravel business?

A Before that, he built that about 1909.

Q And the breakthrough had already taken place?

A Oh, yes, about five years, because it was—this is the reason there was so much gravel come down there and they put a dead-man there and put the bunkers across and drawed the gravel through here to the old—to the present bunkers.

Q I see.

A Of course, the bunkers have been remodeled a good deal since our time since he put it, enlarged, and then the railroad, see, Carver built a — where's the mainland — where does the Southern Pacific cross the Marys River?

Q That isn't shown on there, Mr. Fischer.

A It doesn't show?

Q No, that isn't on that photograph.

A Well, anyhow —

Q Do you know, did anyone try to clear this gully out of trees or logs or anything?

A No.

Q To your knowledge?

A Just natural winter floods.

Q Did it — all right.

A And the soil was so sandy that it just, the current just washed it. On the Seavy side over here there was a lot of trees through here and naturally they wouldn't—the current wouldn't, the trees' roots held the bank, but over on our side it was just sandy soil.

Q I see.

A In fact, the matter is, years ago people in town here, they bought little tracts in there and had gardens which is now all in here, all gone.

Q All in where the river took it out?

A Yeah, the river washed it out.

Q I see.

MR. MIX: I think we have nothing further.

WITNESS: All right.

MR. HERMAN: Thank you very much, Mr. Fischer.

MR. MIX: Thank you. Thank you very much.

WITNESS: Am I through for the day?

MR. MIX: Yes.

MR. HERMAN: You are through for the day.

WITNESS: Maybe I might be called again?

MR. HERMAN: I don't think so, Mr. Fischer.

WITNESS: Well, someone said it would take a couple days to finish the trial.

MR. HERMAN: I don't think we'll be calling you again.

WITNESS: All right. Thank you very much.

MR. HERMAN: Thank you, sir.

WITNESS: I'm 90 years old.

MR. HERMAN: Mr. McReary, you can resume the stand.